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Supreme Court of the United States

OCTOBER TERM, 1958

No. 94

JOSEPH D. BIBB, DIRECTOR OF THE DEPARTMENT OF PUBLIC SAFETY OF THE STATE OF ILLINOIS, ET AL., APPELLANTS,

vs.

NAVAJO FREIGHT LINES, INC., A NEW MEXICO CORPORATION, RINGSBY TRUCK LINES, INC., A NEBRASKA CORPORATION, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

FILED JUNE 10, 1958
PROBABLE JURISDICTION NOTED OCTOBER 13, 1958

SUPREME COURT OF THE UNITED STATES

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INDEX

	Original	Print
Record from the United States District Court for the Southern District of Illinois		
Complaint for declaratory judgment and injunction	3	1
Exhibit "A"—Section 218b of Chapter 95½, Illinois Revised Statutes, as amended	16	14
Notice of motion for temporary restraining order	20	17
Motion and notice of motion of Arkansas Motor Freight Lines, Inc., for leave to intervene	25	18
Proposed complaint in support of motion of Arkansas Motor Freight Lines, Inc., for leave to intervene	27	19
Answer	31	21
Appendix—"Splash guard requirements of various states"	37	26

RECORD PRESS, PRINTERS, NEW YORK, N. Y., DECEMBER 16, 1958

	Original	Print
Record from the United States District Court for the Southern District of Illinois—Continued		
Petition supplementing complaint in support of plaintiffs' motion for temporary injunction	56	4
Exhibit 1—Letter dated November 27, 1957 from Michigan Highway Reciprocity Board to Secretary of State of Illinois	60	4
Exhibit 2—Letter dated November 19, 1957 from Secretary of State of Illinois to Public Service Commission of Michigan	61	4
Exhibit 3—Letter dated August 14, 1957 from Michigan Highway Reciprocity Board to Secretary of State of Illinois	62	4
Preliminary restraining order	64	4
Order overruling motion to dismiss	73	4
Defendants' motion to dismiss at close of plaintiffs' evidence	74	4
Transcript of proceedings of January 15, 1958		
Appearances	76	5
Opening statement of Mr. Axelrod	80	5
Opening statement of Mr. Husted	82	5
Testimony of Jim Crosby—		
direct	83	5
cross	116	7
Clarence Gaughen—		
direct	121	7
cross	135	8
redirect	139	8
recross	140	8
George Hayes—		
direct	141	8
cross	150	9
redirect	153	9
Virgil Segraves—		
direct	154	9
cross	162	10
William G. Karsten—		
direct	166	10
William J. Blohm—		
direct	180	11
cross	192	12

	Original	Print
Record from the United States District Court for the Southern District of Illinois—Continued		
Transcript of proceedings of January 15, 1958—Continued		
Testimony of Joseph H. Dolan—		
direct	194	122
cross	216	137
redirect	226	142
Fred Johnson—		
direct	228	144
cross	236	149
Stipulation as to exhibits	239	151
Motion to dismiss action and denial thereof	240	152
Testimony of William C. Eaves—		
direct	242	153
cross	272	172
redirect	286	181
recross	287	181
Leonard Cooper—		
direct	289	182
Order re filing of briefs	299	188
Transcript of proceedings of January 16, 1958		
Testimony of Leonard Cooper—		
(direct—resumed)	305	190
cross	306	191
Colloquy between Court and counsel	310	194
Testimony of Lucien N. Johnson—		
direct	317	198
cross	328	205
William H. Morris—		
direct	331	207
cross	335	210
Volli Lason—		
direct	336	210
cross	345	216
redirect	348	218
recross	350	219
John Stuper—		
direct	351	219
cross	356	223

	Original	Pr
Record from the United States District Court for the Southern District of Illinois—Continued		
Transcript of proceedings of January 16, 1958—Continued		
Testimony of Donald F. Johnson—		
direct	358	2
cross	365	2
redirect	365	2
Offers in evidence	366	2
Testimony of Joseph Dolan—		
direct	369	2
cross	386	2
Testimony closed	394	2
Argument of Mr. Stephenson	395	2
Argument of Mr. Axelrod	396	2
Argument of Mr. Husted	408	2
Reply argument of Mr. Axelrod	453	2
Opinion, Major, J.	538	2
Findings of fact and conclusions of law	556	3
Final order	562	3
Notice of appeal to the Supreme Court of the United States	564	3
Clerk's certificate (omitted in printing)	570	3
Order noting probable jurisdiction	571	3

[fol. 3] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

SOUTHERN DIVISION

Civil Action No. 2438

In Chancery

NAVAJO FREIGHT LINES, INC., a New Mexico Corporation,

RINGSBY TRUCK LINES, INC., a Nebraska Corporation,

PRUCKA TRANSPORTATION, INC., a Nebraska Corporation,

DENVER CHICAGO TRUCKING CO., INC., a Nebraska Corporation,

WATSON BROS. TRANSPORTATION CO., INC., a Nebraska Corporation, and

PACIFIC INTERMOUNTAIN EXPRESS CO., a Nevada Corporation, Plaintiffs,

vs.

JOSEPH D. BIBB, Director of the Department of Public Safety of the State of Illinois

and

WILLIAM H. MORRIS, Superintendent of the Division of State Highway Police, Department of Public Safety of the State of Illinois, Defendants.

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTION —Filed December 2, 1957

Come now the plaintiffs, Navajo Freight Lines, Inc., a New Mexico corporation; Ringsby Truck Lines, Inc., a Nebraska corporation; Prucka Transportation, Inc., a Nebraska corporation; Denver Chicago Trucking Co., Inc., a Nebraska corporation; Watson Bros. Transportation Co., Inc., a Nebraska corporation; and Pacific Intermountain

Express Co., a Nevada corporation, by Alexrod, Goodman & Steiner, their attorneys, and respectfully state to the Court as follows:

1. This is a proceeding for declaratory and injunctive relief under Title 28, Sections 2201, 2281 and 2284 of the United States Code.

2. Jurisdiction is conferred upon this Court by virtue of Title 28, Sections 1331, 2201 and 2281 of the United States Code.

3. Plaintiff Navajo Freight Lines, Inc. is a New Mexico corporation organized and existing under the laws of the State of New Mexico and maintains its principal office at Denver, Colorado. It engages in the transportation of [fol. 4] property by motor vehicle, as a common carrier in interstate commerce, over regular routes, between points in the States of Arizona, California, Colorado, Illinois, Indiana, Iowa, Kansas, Missouri, Nebraska, Nevada, New Mexico, Oklahoma and Texas, pursuant to a certificate of public convenience and necessity issued to it by the Interstate Commerce Commission in Docket No. MC 76032 and various subs thereunder. Plaintiff Navajo Feeight (sic) Lines, Inc. holds no authority from the Illinois Commerce Commission to operate in intrastate commerce in Illinois and does not render any intrastate transportation in Illinois.

4. Plaintiff Ringsby Truck Lines, Inc. is a Nebraska corporation organized and existing under the laws of the State of Nebraska and maintains its principal office at Denver, Colorado. It engages in the transportation of property by motor vehicle, as a common carrier, in interstate commerce, over regular and irregular routes, between points in the States of California, Colorado, Illinois, Iowa, Kansas, Missouri, Nebraska, Nevada, Utah and Wyoming, pursuant to a certificate of public convenience and necessity issued to it by the Interstate Commerce Commission in Docket No. MC 52709 and various subs thereunder. Plaintiff Ringsby Truck Lines, Inc. holds no authority from the Illinois Commerce Commission to operate in intrastate commerce in Illinois and does not render any intrastate transportation in Illinois.

5. Plaintiff Prucka Transportation, Inc. is a Nebraska corporation organized and existing under the laws of the State of Nebraska and maintains its principal office at Omaha, Nebraska. It engages in the transportation of property by motor vehicle, as a common carrier, in interstate commerce, over regular routes, between points in the States of Colorado, Illinois, Indiana, Iowa, Kansas, Missouri, Nebraska and Wyoming, pursuant to a certificate of public convenience and necessity issued to it by the Interstate Commerce Commission in Docket No. MC 111700 and various subs thereunder. Plaintiff Prucka Transportation, Inc. holds no authority from the Illinois Commerce Commission to operate in intrastate commerce in Illinois and does not render any intrastate transportation in Illinois.

[fol. 5] 6. Plaintiff Denver Chicago Trucking Co., Inc. is a Nebraska corporation organized and existing under the laws of the State of Nebraska and maintains its principal office at Denver, Colorado. It engages in the transportation of property by motor vehicle, as a common carrier, solely in interstate commerce, over regular and irregular routes, between points in the States of Arizona, California, Colorado, Connecticut, Idaho, Illinois, Indiana, Kansas, Massachusetts, Michigan, Missouri, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Utah, Washington and Wyoming pursuant to a certificate of public convenience and necessity issued to it by the Interstate Commerce Commission in Docket No. MC 29988 and various subs thereunder. Plaintiff Denver Chicago Trucking Co., Inc. holds no authority from the Illinois Commerce Commission to operate in intrastate commerce in Illinois and does not render any intrastate transportation in Illinois.

7. Plaintiff Watson Bros. Transportation Co., Inc. is a Nebraska corporation organized and existing under the laws of the State of Nebraska and maintains its principal office at Omaha, Nebraska. It engages in the transportation of property by motor vehicle, as a common carrier, in interstate commerce, over regular and irregular routes, between points in the States of Arizona, California, Colorado, Illinois, Iowa, Kansas, Minnesota, Missouri, Nebraska, New Mexico and Wyoming, pursuant to a certificate of

public convenience and necessity issued to it by the Interstate Commerce Commission in Docket No. MC 70451 and various subs thereunder. Plaintiff Watson Bros. Transportation Co., Inc. holds authority from the Illinois Commerce Commission to operate in intrastate commerce in Illinois only between Chicago, Illinois and Rock Island, Illinois and said plaintiff alleges that in excess of 99% of its operation over Illinois highways involves the transportation of property moving in interstate commerce.

8. Plaintiff Pacific Intermountain Express Co. is a Nevada corporation organized and existing under the laws of the State of Nevada and maintains its principal office at Oakland, California. It engages in the transportation of property by motor vehicle, as a common carrier in interstate commerce, over regular and irregular routes, between [fol. 6] points in the States of California, Colorado, Idaho, Illinois, Indiana, Kansas, Missouri, Montana, Nevada, Oregon, Utah, Washington and Wyoming, pursuant to a certificate of public convenience and necessity issued to it by the Interstate Commerce Commission in Docket No. MC 730 and various subs thereunder. Plaintiff Pacific Intermountain Express Co. holds no authority from the Illinois Commerce Commission to operate in intrastate commerce in Illinois and does not render any intrastate transportation in Illinois.

9. Section 121.02 of the Uniform Act Regulating Traffic on Highways, being Section 218b of Chapter 95½, Illinois Revised Statutes, as amended, by Act approved July 8, 1957, hereinafter referred to as the Act, requires that all trailers such as are operated by plaintiffs herein shall be equipped with so called contour mudflaps or splash guards, as more fully appears from a copy of said Act attached hereto as Exhibit A and specifically made a part hereof. A contour mudflap, or splash guard, as specifically described in said Act, differs radically in design and construction from the so called straight mudflap which is lawful and acceptable in all other States of the United States, and which had heretofore (prior to the passage of

Section 121.02, as amended) been lawful and acceptable in the State of Illinois.*

10. Defendant Joseph D. Bibb is Director of the Department of Public Safety of the State of Illinois, which department maintains the division known as the State Highway Police, of which defendant William H. Morris is Superintendent; Defendant Morris is responsible to defendant Bibb in the management and control of said Division and defendants Bibb and Morris and their subordinate officers have the direction, power and duty and duty (sic). [fol. 7] (Section 307, 16, Chapter 121, Ill. Rev. Stat.) of enforcement of the provisions of the Uniform Act Regulating Traffic on Highways (Section 98, et seq. Chapter 95½, Ill. Rev. Stat.). Said defendants will, pursuant to their legal duties, enforce the provisions of said Act as soon as it becomes effective on January 1, 1958.

11. Said Act is unconstitutional and void and constitutes an unreasonable and undue burden upon interstate commerce, in violation of Article I, Section 8, of the Constitution of the United States, which grants to Congress the power to regulate commerce among the several States, and which provides:

> "The Congress shall have power . . . to regulate commerce among the several States . . ."

12. Section 121.03 of the Uniform Act Regulating Traffic on Highways, being Section 218b of Chapter 95½, as amended, is unconstitutional and void and in direct conflict with Article VI, Clause 2, of the Constitution of the United States, which provides as follows:

---

* Twenty-five (25) States—California, Connecticut, Georgia, Idaho, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, New Hampshire, New Jersey, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Vermont, Virginia, Washington and Wisconsin, have statutes which require the standard or conventional straight mudflap or splash guard. The District of Columbia and twenty-two (22) States—Alabama, Arizona, Arkansas, Colorado, Delaware, Florida, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Missouri, Montana, Nevada, New Mexico, North Carolina, North Dakota, South Carolina, South Dakota, West Virginia and Wyoming have no mudflap or splash guard requirements whatsoever.

"This Constitution . . . shall be the supreme Law of the Land; and the judges in every State shall be bound thereby, and anything in the Constitution or Laws of any State to the contrary notwithstanding."

13. Under said Act each of the plaintiffs is required to remove the mud guard or splash guard from its trailers and replace them with the contour type splash guard now necessary only in Illinois. Plaintiff Navajo Freight Lines, Inc. will be required by said Act to replace the present mudflap with the contour type mudflap on approximately 733 trailers which it operates in interstate commerce. Plaintiff Ringsby Truck Lines, Inc. will be required by said Act to replace the present mudflap with the contour type mudflap on approximately 468 trailers which it operates in interstate commerce. Plaintiff Prucka Transportation, Inc. will be required by said Act to replace the present mudflap with the contour type mudflap on approximately 150 trailers which it operates in interstate commerce. Plaintiff Denver Chicago Trucking Co., Inc. will be required by said Act to replace the present mudflap with the contour [fol. 8] type mudflap on approximately 750 trailers which it operates in interstate commerce. Plaintiff Watson Bros. Transportation Co., Inc., will be required by said Act to replace the present mudflap with the contour type mudflap on approximately 1,528 trailers which it operates in interstate commerce. Plaintiff Pacific Intermountain Express Co. will be required by said Act to replace the present mudflap with the contour type mudflap on approximately 1,200 trailers which it operates in interstate commerce.

14. Plaintiffs herein will be required by said Act to expend large sums of money in order to remove the present mudflaps from their trailers and install the required contour type mudflaps. The cost of installation is approximately $30.00 per vehicle, so that the initial cost of complying with said Act for plaintiff Navajo Freight Lines, Inc. will be $21,990.00; for plaintiff Ringsby Truck Lines, Inc., $14,040.00; for plaintiff Prucka Transportation, Inc. $4,500.00; for plaintiff Denver Chicago Trucking Co., Inc.

$22,500.00; for plaintiff Watson Bros. Transportation Co., Inc. $45,840.00; and for plaintiff Pacific Intermountain Express Co. $36,000.00, and these costs are in addition to the substantial cost of replacement parts which must be kept on hand at all times.

15. Plaintiff Navajo Freight Lines, Inc. operates approximately 32,000,000 miles per year in interstate commerce and of that only approximately 2,505,431 miles, or 7%, are over Illinois highways. Plaintiff Ringsby Truck Lines, Inc. operates approximately 30,000,000 miles per year in interstate commerce and of that only approximately 937,876 miles, or 3%, are over Illinois highways. Plaintiff Prucka Transportation, Inc. operates approximately 5,000,000 miles per year in interstate commerce and of that only approximately 250,000 miles, or 5%, are over Illinois highways. Plaintiff Denver Chicago Trucking Co., Inc. operates approximately 57,000,000 miles per year in interstate commerce and of that only approximately 2,759,867, or 4%, are over Illinois highways. Plaintiff Watson Bros. Transportation Co., Inc. operates approximately 58,000,000 miles per year in interstate commerce and of that only approximately 4,176,312 miles, or 7%, are [fol. 9] over Illinois highways. Plaintiff Pacific Intermountain Express Co. operates approximately 90,000,000 miles per year in interstate commerce and of that only approximately 3,182,000 miles, or 3%, are over Illinois highways.

16. Although in excess of 99% of plaintiffs' combined operations are in interstate commerce and approximately 95% of said operations are conducted outside of the State of Illinois, each of said plaintiffs will be required to place the contour mudflap or splash guard required by said Act upon all of their trailers because it is physically impossible on a day to day basis in the normal course of plaintiffs' interstate operations to ascertain in advance which trailers will be required to be operated over highways either in or through the State of Illinois.

17. The foregoing expenditure of substantial sums of money by plaintiffs in order to equip all of their vehicles with the contour mudflap or splash guard required by said

Act will not improve the safety of operation on Illinois highways in any respect whatsoever; and, in fact, said contour mudflaps will, instead, have an adverse effect upon the safety of operation on Illinois highways in that said contour mudflaps will introduce new hazards, dangers and obstacles for all motor vehicles which are not now present on Illinois highways.

18. In the ordinary conduct of their businesses, plaintiffs, in order to properly perform a transportation service covering the numerous commodities which cannot be physically transferred from the trailer of one carrier to the trailer of another carrier, engage in the practice of interchanging trailers. For example, a carrier who serves between Portland, Oregon and Denver, Colorado will handle and originate a trailer load of perishable commodities destined to Chicago. The Oregon carrier will move the trailer from Portland to Denver and there deliver its trailer, without transferring the lading therein, for movement to destination via any one of the plaintiffs herein. The practice of interchanging trailers and handling traffic in this manner is and has been a long established one, and is designed for the purpose of providing and performing an adequate service to the shipping public. A substantial amount of various kinds of traffic presently being handled [fol. 10] by plaintiffs is and has been moving for a great many years in the past in plaintiffs' transportation services under interchange arrangements such as described herein with numerous other motor carriers. Particularly, and most important, movements for the United States Government, covering especially explosives, are required to be handled in sealed trailers which cannot be opened until delivered, and because these movements involve service between many points and no one carrier is authorized to serve directly between all points, it is essential and necessary that they move in interchange service as described herein via the lines of numerous carriers including plaintiffs herein. Plaintiffs herein are and have been handling an exceptionally great amount of traffic for the United States Government, which moves in sealed trailers, thus requiring the interchange of trailers between plaintiffs and other motor carriers. In

addition to Government traffic, and particularly explosives, plaintiffs herein are called upon daily to transport numerous other commodities which, for one reason or another, may not be physically transferred from one trailer to another and are required to be handled in interchange trailer service. This is because certain commodities, because of their size and weight, are too heavy or too bulky for physical transfer and because certain traffic, because of its inherent nature, is susceptible to damage or breakage when physically handled and transferred. Plaintiffs also transport a substantial amount of perishable traffic (items which require protection from heat or cold in transit) which cannot be physically transferred without running the risk of spoilage. Further, many shippers and consignees specify in their bills of lading (the contract between the shipper and its carrier) that the commodity which they ship must remain in the same trailer until it reaches its destination. As a result, the interchange trailer arrangement practice, which has been developed over a period of many years, as briefly described herein, is the only means by which many commodities and shipments can move beyond the scope of an originating carrier's authority; and the commerce of this country, daily, in the case of motor carrier transportation, involves large, substantial and important movements of traffic through the interchange trailer arrangement. [fol. 11] Plaintiffs herein, and other interstate carriers who serve points in Illinois, have no means by which they can compel their interline carriers (of which there are many with whom they conduct joint operations) and who do not operate into Illinois, to equip their trailers with contour mudflaps as required by the statute. As a matter of fact, plaintiffs herein have been notified by some of their connecting carriers that as a result of the requirement for contour mudflaps in Illinois, that they will be compelled to refuse to interline traffic moving in interchange trailer arrangements with plaintiffs. As such, the effect of the statute is to require that the nation's trailers be equipped with contour mudflaps, that is, trailers operated by carriers in California, Oregon, Florida and New York, among other States, for example, who have no authority under their own certificates to operate into the State of Illinois will have to

be equipped with contour mudflaps in order to meet the requirements of the Illinois statute in order to participate in traffic destined to Illinois or required to be transported through Illinois.

19. Plaintiffs presently interchange trailers with a great many carriers at various points throughout the United States in order to serve points in Illinois, and plaintiffs herein handle a substantial amount of interline traffic, a very substantial amount of which moves in interchange trailer service arrangements. Specifically, approximately 30.5% of all of the traffic handled by plaintiff Navajo Freight Lines, Inc. is traffic which moves in interline service as described herein; approximately 60% of all of the traffic handled by plaintiff Ringsby Truck Lines, Inc. is traffic which moves in interline service as described herein; approximately 61.62% of all of the traffic handled by Prucka Transportation, Inc. is traffic which moves in interline service as described herein; approximately 60% of all of the traffic handled by Denver Chicago Trucking Co., Inc. is traffic which moves in interline service as described herein; approximately 65% of all of the traffic handled by Watson Bros. Transportation Co., Inc. is traffic which moves in interline service as described herein; and approximately 65% of all of the traffic handled by Pacific Intermountain Express Co. is traffic which moves in interline service as described herein. The revenues which accrue to the plain-
[fol. 12] tiffs in connection with the movement of their respective interline freight is substantial. For example, in the year 1956 plaintiff Pacific Intermountain Express Co. transported traffic which moved to, from or through its Chicago terminal which produced revenues of approximately $3,182,000. For further example, plaintiff Watson Bros. Transportation Co., Inc. in the month of May, 1957 generated traffic moving to, from or through its Chicago terminal which produced revenues of $983,609 and of said revenues approximately $345,000 was revenue on traffic which moved into the Chicago terminal from points outside of the State of Illinois. During the same month, Watson Bros. Transportation Co., Inc. handled freight moving into, from or through its Peoria, Illinois terminal which

produced revenue of approximately $107,000, of which approximately $33,500 was in connection with freight moving into Peoria, Illinois from points outside of the State of Illinois. The figures for the other plaintiffs would be comparable.

20. Plaintiffs' existence and their operations depend upon the revenue received by them from the transportation of interline traffic. They will suffer great and irreparable damage due to the loss of this tonnage. The resultant loss of revenue caused by the loss of this traffic will materially and drastically affect their ability to continue to serve the shipping public, not only in the State of Illinois, but throughout the other States in which they operate. Additionally, it will destroy the "balance" of their operations and their ability to keep equipment available at all points within the areas they are authorized to serve.

21. Said Act, by hindering and obstructing interline operations as hereinabove described, will unreasonably burden and impede the free flow of interstate commerce and constitutes an undue burden on interstate commerce contrary to Article I, Section 8, of the Constitution of the United States.

22. Said Act, in addition to imposing a serious burden on the interstate commerce conducted by plaintiffs herein and materially impeding the movement of plaintiffs' interstate motor vehicles through the State of Illinois, likewise imposes a substantial obstruction to the National Policy proclaimed by Congress to promote adequate, economical [fol. 13] and efficient transportation service throughout the United States.

23. The Statute is obstructive to interstate motor carrier operations and will have a serious adverse effect on national transportation efficiency and economy, to such an extent that the police power of the State of Illinois is outweighed by the interests of the nation, which requires that an adequate, economical and efficient transportation service must prevail.

24. Said Act describes the required contour mudflap or splash guard with complete specificity providing that said equipment

(1) Contour the wheel;

(2) Cover the top 90° of the rear 180° (exempting vehicles of less than five inches clearance, and requiring that they contour within 2 inches of the body);

(3) Extend downward to within 10 inches of the ground;

(4) Have a lip or flange of two inches upon the outside edge;

(5) Retain its general parallel condition under all operating conditions when mounted as required by the Statute not more than six inches from the tread when fully loaded.

As a result of said detailed description, there is but one type of mudflap or splash guard which can satisfy the requirements of the said Act.

25. Said Act is unconstitutional and void and an unreasonable and undue burden upon interstate commerce in that the Legislature of the State of Illinois has exceeded its power under the United States Constitution by describing the equipment to be used by motor carriers in interstate commerce with such particularity that it would be impossible to comply with the Illinois Act and still operate in interstate commerce if all other States or any other State attempted to exercise the same power by describing with equal specificity the only type of mudflap or splash guard which it would permit.

26. The Act requires plaintiffs to immediately expend large sums of money and unless the defendants Joseph D. [fol. 14] Bibb, Director of the Department of Public Safety of the State of Illinois, and William H. Morris, Superintendent of the Division of State Highway Police, Department of Public Safety of the State of Illinois, are each separately restrained from bringing any proceeding

against plaintiffs pursuant to the said section, plaintiffs will suffer irreparable damage.

27. There is no remedy other than by this action in this Court by which plaintiffs can receive equitable and just relief, and there exists no adequate remedy at law for preventing the multiplicity of suits that will arise from attempted enforcement of this unconstitutional Act, and that plaintiffs, in the attempted enforcement of this Act, will be harassed in the conduct of their businesses by the stopping of their vehicles and the assessment of fines and penalties.

Wherefore, plaintiffs pray:

1. That this Court enter a temporary restraining order enjoining and restraining the defendants, and each of them, their successors in office, and their agents, attorneys and employees, and each and every one of them, until the Court holds a hearing on the preliminary injunction and complaint filed herein, from enforcing or instituting proceedings to enforce Section 121.02 of the Uniform Act Regulating Traffic on Highways, being Section 218b of Chapter 95½, as amended (Ill. Rev. Stat.) against plaintiffs herein.

2. That this Court convene a three Judge District Court as required under Title 28, Sections 2281 and 2284 of the United States Code, and that process issue against defendants as provided by law;

3. That a declaratory judgment be entered decreeing that Section 121.02 of the Uniform Act Regulating Traffic on Highways, being Section 218b of Chapter 95½, as amended (Ill. Rev. Stat.) be held unconstitutional and void and that said Section be held for naught;

4. That this Court grant a preliminary injunction enjoining and restraining the defendants, and each of them, their successors in office, and their agents, attorneys and employees, and each and every one of them, during the pendency, of this suit, from enforcing or instituting pro-
[fol. 15] ceedings to enforce Section 121.02 of the Uniform Act Regulating Traffic on Highways, being Section 218b

of Chapter 95½, as amended (Ill. Rev. Stat.) against plaintiffs herein.

5. That after full hearing the defendants, and each of them, their successors in office and their agents, attorneys and employees, and each and every one of them be permanently restrained and enjoined by the order of this Court from enforcing or instituting proceedings to enforce Section 121.02 of the Uniform Act Regulating Traffic on Highways, being Section 218b of Chapter 95½, as amended (Ill. Rev. Stat.) against plaintiffs herein; and

6. Plaintiffs pray for such other and further relief as this Court may deem just and proper in the premises.

/s/ Axelrod, Goodman and Steiner by David Axelrod, Attorneys for Plaintiffs.

Axelrod, Goodman & Steiner, 39 South LaSalle Street, Chicago 3, Illinois, Central 6-9375.

[fol. 16]

EXHIBIT "A" TO COMPLAINT

MOTOR VEHICLE 95½ § 218b

§ 218b. Rear fender splash guards

It is unlawful for any person to operate any motor vehicle of the second division upon the highways of this state outside the corporate limits of a city, village or incorporated town unless such vehicle is equipped with rear fender splash guards which shall comply with the specifications hereinafter provided in this Section; except that any motor vehicle of the second division which is or has been purchased, new or used, prior to August 1, 1957 shall be equipped with rear fender splash guards which are so attached as to prevent the splashing of mud or water upon the windshield of other motor vehicles and such splash guards on such vehicle shall not be required to comply with the specifications hereinafter provided in this Section until January 1, 1958.

The rear fender splash guards shall contour the wheel in such a manner that the relationship of the inside surface

of any such splash guard to the tread surface of the tire or wheel shall be relatively parallel, both laterally and across the wheel, at least throughout the top 90 degrees of the rear 180 degrees of the wheel surface; provided however, on vehicles which have a clearance of less than 5 inches between the top of the tire or wheel and that part of the body of the vehicle directly above the tire or wheel when the vehicle is loaded to maximum legal capacity, the curved portion of the splash guard need only extend from a point directly behind the center of the rear axle and to the rear of the wheel surface upwards to within at least 2 inches of the bottom line of the body when the vehicle is loaded to maximum legal capacity. On all vehicles to which this Section applies; there shall be a downward extension of the curved surface which shall end not more than 10 inches from the ground when the vehicle is loaded to maximum legal capacity. This downward extension shall be part of the curved surface or attached directly to said curved surface, but it need not contour the wheel.

The splash guards shall be wide enough to cover the full tread or treads of the tires being protected and shall be installed not more than 6 inches from the tread surface of the tire or wheel when the vehicle is loaded to maximum legal capacity. The splash guard shall have a lip or flange on its outside edge to minimize side throw and splash. The lip or flange shall extend toward the center of the wheel, and shall be perpendicular to and extend not less than 2 inches below the inside or bottom surface line or plane of the guard.

The splash guards may be constructed of a rigid or flexible material, but shall be attached in such a manner that, regardless of movement, either by the splash guards or the vehicle, the splash guards will retain their general parallel relationship to the tread surface of the tire or wheel under all ordinary operating conditions.

This Section shall not apply to motor vehicles whose construction or design does not require such splash guards, nor to motor vehicles in-transit and capable only of using temporary splash guards approved by the Illinois State Highway Police.

This Section shall not apply to motor vehicles which do not have more than 2 axles and which are used primarily in agricultural pursuits, nor to pole trailers, dump trucks, "ready-mix" type of cement trucks, nor to trucks used primarily for transporting grain which are dumped or unloaded by use of hoists or lifts, nor to vehicles operated principally off the highways of this state and used primarily in public construction or for purposes associated with or in aid of drilling, mining or otherwise severing of natural resources from their natural depository nor to motor vehicles operated principally within the corporate limits of a city, village or incorporated town or within a short radius thereof; provided, the Department of Public [fol. 17] Safety may, in order to promote greater safety on the highways of this State and accomplish the purposes of this Section, adopt and promulgate reasonable rules and regulations establishing specifications or designs for splash guards, other than the contour type of splash guard hereinbefore specified, to be used on the vehicles mentioned in this paragraph while said vehicles are operated on the highways of this State. In adopting or promulgating any such rules or regulations, the Department of Public Safety shall consider, among other things, the type of vehicle, the design or construction of the vehicle, the purpose or purposes for which the vehicle is used, the conditions or circumstances under which the vehicle operates and the distance the vehicle travels upon the highways of this State. 1935, July 9, Laws 1935, p. 1247, art. XV, §121.02, added 1951, July 2, Laws 1951, p. 942, §1, as amended 1955, July 15, Laws 1955, p. 2133, §1; 1957, July 8, Laws 1957, p. ....., H.B. No. 157, §1.

[fol. 20] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

SOUTHERN DIVISION

Civil Action No. 2438

In Chancery

[Title omitted]

NOTICE OF MOTION FOR TEMPORARY RESTRAINING ORDER—Filed Dec. 2, 1957

To:

Hon. William Stratton, Governor of the State of Illinois, State Office Building, Springfield, Illinois.

Hon. Latham Castle, Attorney General of the State of Illinois, State Office Building, Springfield, Illinois.

Hon. Joseph D. Bibb, Director of the Department of Public Safety of the State of Illinois, State Office Building, Springfield, Illinois, and

Hon. William H. Morris, Superintendent of the Division of State Highway Police, Department of Public Safety of the State of Illinois, New State Office Building, Springfield, Illinois.

Please Take Notice that on the 18th day of December, 1957, at the hour of 10:00 A.M., or as soon thereafter as counsel may be heard, we shall appear before the Hon. Charles G. Briggle, District Court Judge, in the Courtroom [fol. 21] usually occupied by him in the United States Courthouse, Springfield, Illinois, and shall then and there request said Judge to enter a temporary restraining order in accordance with the Complaint filed herewith, a copy of which is herewith served upon you with this Notice. At said time plaintiffs will be prepared to offer evidence in open Court in support of plaintiffs' motion for a temporary restraining order, as prayed for in the Complaint attached hereto.

At which time you may appear if you see fit.

Axelrod, Goodman and Steiner by David Axelrod,
Attorneys for Plaintiffs.

[fol. 25] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF ILLINOIS

(SOUTHERN DIVISION)

Civil Action No. 2438

NAVAJO FREIGHT LINES, INC., A New Mexico Corporation,
RINGSBY TRUCK LINES, INC., A Nebraska Corporation,
PRUCKA TRANSPORTATION, INC., A Nebraska Corporation,
DENVER CHICAGO TRUCKING CO., INC.,
A Nebraska Corporation,
WATSON BROS. TRANSPORTATION CO., INC.,
A Nebraska Corporation,
PACIFIC INTERMOUNTAIN EXPRESS CO.,
A Nevada Corporation, Plaintiffs,

VS

JOSEPH D. BIBB, Director of the Department of Public Safety of the State of Illinois,

AND

WILLIAM H. MORRIS, Superintendent of the Division of State Highway Police, Department of Public Safety of the State of Illinois, Defendants.

ARKANSAS MOTOR FREIGHT LINES, INC.,
An Arkansas Corporation, Applicant for Intervention.

MOTION AND NOTICE OF MOTION OF ARKANSAS MOTOR FREIGHT LINES, INC., FOR LEAVE TO INTERVENE—Filed Dec. 12, 1957

Arkansas Motor Freight Lines, Inc., moves for leave to intervene as a party plaintiff in this action in order to

assert the matters set forth in its proposed complaint, of which a copy is hereto attached, on the grounds that it has a substantial interest in the subject matter of the action; that the representation of its interest by the original plaintiffs is or may be inadequate, that it will be bound by a judgment in the action; that its interest and the main action have question of law and fact in common, and that its intervention will not to any extent delay or predjudice (sic) the adjucation (sic) of the rights of the original parties.

Dated this 12th day of December A.D., 1957.

[fol. 26] Arkansas Motor Freight Lines, Inc., By /s/ Mack Stephenson, By /s/ Thomas Harper.

Of Counsel: Stephenson and Routman, Attorneys-at-Law, 208 East Adams Street, Springfield, Illinois.

Harper, Harper and Young, Attorneys-at-Law, Kelly Building, Fort Smith, Arkansas.

[fol. 27]

PROPOSED COMPLAINT IN SUPPORT OF MOTION OF ARKANSAS MOTOR FREIGHT LINES, INC., FOR LEAVE TO INTERVENE— Filed December 12, 1957

Now Comes Arkansas Motor Freight Lines, Inc., by Mack Stephenson and Thomas Harper, its attorneys, and respectfully states to the Court as follows:

1. By Complaint filed on December 2, 1957 plaintiffs in the above-entitled cause instituted a proceeding for declaratory and injunctive relief under Title 28, Section 2201, 2281 and 2284 of the United States Code.

2. Intervener by accompanying motion, seeks leave to intervene pursuant to Federal Rules of Civil Procedure Rule 24, Title 28 United States Code.

3. Jurisdiction is conferred upon the Court by virtue of Title 28, Section 1331, 2201 and 2281 of the United States Code.

[fol. 28] 4. Intervener is an Arkansas corporation organized and existing under the laws of the State of Arkansas and maintains its principal office at Fort Smith,

Arkansas. It engages in the transportation of property by motor vehicle, as a common carrier in interstate commerce over regular routes, between points in the States of Arkansas, Kansas, Missouri, Illinois, Louisiana and Texas pursuant to a certificate of public convenience and necessity issued to it by the Interstate Commerce Commission in Docket No. MC 29910 and various subs thereto. Intervener holds no authority from the Illinois Commerce Commission to operate in intrastate commerce in Illinois and said Intervener alleges that the greater part of its operations over Illinois highways involves the transportation of property moving in interstate commerce. In substance, Intervener's operations in interstate commerce are similar to those of plaintiffs in the above-entitled action and Intervener has, therefore, a vital and direct interest in the determination of said action.

5. On January 2, 1957, at 2:30 P.M., one Paul Snedeker, a driver-employee of Intervener, was engaged in the operation of a semi-trailer type vehicle upon a public highway, namely Route 40, in the County of Effingham, Township of Douglas, in the State of Illinois. At said time and place, Intervener's vehicle, operated by Snedeker, was halted by one John D. Gagen, an Illinois State Trooper. Said Gagen thereupon issued to Snedeker an Arrest Ticket and Complaint Number 114167 specifying therein that the vehicle was not equipped with contour splash guards, in violation of Section 121.02 of the Uniform Act Regulating Traffic on Highways, being Section 218b of Chapter 95½, Illinois Revised Statutes, as amended, by Act approved July 8, 1957, hereinafter called Act, the constitutional validity of which is at issue in the above-entitled action.

6. On January 2, 1957, Trooper Gagen caused said complaint to be filed against Snedeker in the Police Magistrate Court of Effingham County, Illinois, before Police Magistrate Ray R. McCallen. Snedeker, appearing in Court and [fol. 29] entering a plea of not guilty to the said complaint, posted cash bond in the amount of $25.00. Hearing was set for January 30, 1957 but was subsequently continued generally until October 7, 1957 at which time Judge McCallen declared Snedeker to be in default and ordered for-

feiture of the cash bond. An order was entered assessing a fine against Snedeker in the amount of $19.00 for violation of the Act and an additional sum in the amount of $6.00 was assessed for Court costs. Payment of both the fine and Court costs was directed to be made from the forfeited bond money. On October 28, 1957 an Appeal was taken from the aforementioned judgment of the Police Magistrate Court to the Circuit Court of the County of Effingham, State of Illinois.

7. By reason of the pendency of the aforementioned Appeal, Intervener will be directly and immediately affected by the outcome of this action and desires, therefore, to introduce evidence in support of allegations contained in the Complaint filed by plaintiffs herein.

Wherefore Intervener respectfully prays that the declaratory and injunctive relief sought by plaintiffs be granted.

Arkansas Motor Freight Lines, Inc., By /s/ Mack Stephenson, By /s/ Thomas Harper.

Of Counsel: Stephenson and Routman, Attorneys-at-Law, 208 East Adams Street, Springfield, Illinois.

Harper, Harper and Young, Attorneys-at-law, Kelly Building, Fort Smith, Arkansas.

[fol. 30] Certificate of Service (omitted in printing).

[fol. 31]

In the United States District Court for the Southern District of Illinois

Southern Division

[Title omitted]

Answer—Filed December 17, 1957

Come now defendants, Joseph D. Bibb, Director of the Department of Public Safety of the State of Illinois, and William H. Morris, Superintendent of the Division of State Highway Police, Department of Public Safety of

the State of Illinois, by Latham Castle, Attorney General of the State of Illinois, their attorney, and for Answer to the Complaint for Declaratory Judgment and Injunction, heretofore filed herein, say:

1. They admit the allegation of paragraph 1 of said Complaint.

2. They admit the allegation of paragraph 2 of said Complaint.

3. They have no knowledge of the matters and and (sic) [fol. 32] things alleged in paragraph 3 of said Complaint and can, therefore, neither admit nor deny the same.

4. They have no knowledge of the matters and things alleged in paragraph 4 of said Complaint and can, therefore, neither admit nor deny the same.

5. They have no knowledge of the matters and things alleged in paragraph 5 of said Complaint and can, therefore, neither admit nor deny the same.

6. They have no knowledge of the matters and things alleged in paragraph 6 of said Complaint and can, therefore, neither admit nor deny the same.

7. They have no knowledge of the matters and things alleged in paragraph 7 of said Complaint and can, therefore, neither admit nor deny the same.

8. They have no knowledge of the matters and things alleged in paragraph 8 of said Complaint and can, therefore, neither admit nor deny the same.

9. They admit that Section 121.02 of the Uniform Act Regulating Traffic on Highways, being Section 218b of Chapter 95½, Illinois Revised Statutes, as amended by Act approved July 8, 1957, requires that all trailers such as are operated by plaintiffs herein shall be equipped with contour mud flaps or splash guards if said trailers are used on the public highways of the State of Illinois; they further admit that a contour mud flap or splash guard, as specified in said Act, differs in design and construction from the old-style straight mud flap, but they deny that

such straight mud flaps are lawful in all other states of the United States, as alleged in said paragraph 9, and aver, on the contrary, that certain states of the United States, viz., Idaho and Oregon, have comparable splash guard requirements and specifications and further aver that several [fol. 33] others, viz., Connecticut, Minnesota, Mississippi, New Jersey, Ohio, Rhode Island and Utah, require comparable fenders or splash guards if the vehicle does not have a floor or body above the rear wheels, but permit the apron flap behind the rear wheels where there is floor or body above;* and they admit that such straight mud flaps were lawful in the State of Illinois prior to passage of the original Section 121.02 in 1955.

10. They admit the allegations of paragraph 10 of said Complaint.

11. They deny each and all the allegations of paragraph 11 of said Complaint, and aver, on the contrary, that said Act is a valid, reasonable exercise of the police power of the State of Illinois.

12. They deny each and all the allegations of paragraph 12 of said Complaint, and aver that the question of supremacy is not in issue here for the reason that the federal authority has not been asserted, i.e., Congress has not legislated on the subject of rear wheel splash guards for motor vehicles at all.

13. They admit that plaintiffs will be required by the Act to equip its trailers with the contour type splash guard for their vehicles which will be used on Illinois highways; and defendants neither admit nor deny the other allegations contained in paragraph 13 of said Complaint for the reason that they have no knowledge as to the number of trailers which plaintiffs contemplate using in Illinois after January 1, 1958.

[fol. 34] 14. They neither admit nor deny the allegations made and contained in paragraph 14 of said Complaint for the reason that they have no knowledge as to the number

* Appendix, splash guard requirements of various states.

of trailers which plaintiffs intend to use on the highways of Illinois after January 1, 1958.

15. They have no knowledge of the matters and things alleged in paragraph 15 of said Complaint and can, therefore, neither admit nor deny the same, but plaintiffs deny the materiality of such allegations to the issues raised by this Complaint.

16. They neither admit nor deny the allegations of paragraph 16 of said Complaint for the reason that they have no knowledge as to the number of plaintiffs' trailers which will be operated over Illinois highways on and after January 1, 1958.

17. They deny each and all the allegations of paragraph 17 of said Complaint.

18. They neither admit nor deny the discussion, historical background, explanations and examples made and contained in paragraph 18 of said Complaint for the reason that the same are not allegations, and they aver that the same are not relevant to the question of the constitutional validity of the Act under attack.

19. They neither admit nor deny the allegations of paragraph 19 and challenge the relevancy thereof to the issues of this suit.

20. They deny the material allegations of paragraph 20 of said Complaint and challenge the materiality and relevancy thereof to the issue of validity of the Act under attack; and they aver that compliance with said Act by plaintiffs could not logically be expected to cause any loss of tonnage or revenue, as plaintiffs assert therein.

[fol. 35] 21. They deny the allegations of paragraph 21 of said Complaint.

22. They deny the allegations of paragraph 22 of said Complaint, and aver, on the contrary, that the prevention of mud and water spray on the windshields of motor vehicles on the highways, as this Act is designed to accomplish, will actually promote adequate, economical and efficient transportation service throughout the United States.

23. They deny the allegation of paragraph 23 of said Complaint.

24. They admit that said Act describes the required contour splash guard with complete specificity, but they neither admit nor deny the allegation that "there is but one type of mud flap or splash guard which can satisfy the requirements of the said Act" for the reason that they are uninformed as to what Complainants mean by "one type".

25. They deny the allegations made and contained in paragraph 25 of said Complaint, and aver that the same raises speculative and conjectural matters which are based on unreal and imaginary conditions.

26. They deny the allegations of paragraph 26 of said Complaint.

27. They deny the allegations of paragraph 27 of said Complaint, and aver that the same indicates a willful intention on the part of plaintiffs to violate the Act.

Wherefore, defendants deny that plaintiffs are entitled to a temporary restraining order, as prayed for in said Complaint; deny that plaintiffs are entitled to a preliminary injunction, as further prayed for therein; deny that [fol. 36] plaintiffs are entitled to a declaratory judgment declaring the Act under attack to be unconstitutional; and further deny that plaintiffs are entitled to any permanent injunction herein.

Joseph D. Bibb, Director of the Department of Public Safety of the State of Illinois,

William H. Morris, Superintendent of the Division of State Highway Police, Department of Public Safety of the State of Illinois, Defendants. By /s/ Latham Castle, Attorney General of the State of Illinois, By /s/ Richard W. Husted, Assistant Attorney General.

Latham Castle, Attorney General, Supreme Court Building, Springfield, Illinois, 4-4871.

[fol. 37]

APPENDIX TO ANSWER

California, Veh. C. A., Section 678.5, Deering's California Codes

Mudgards (sic) Required. No person shall operate on any highway any motor vehicle, trailer, or semitrailer unless equipped with fenders, covers, or devices, including flaps or splash aprons, or unless the body of the vehicle or attachments thereto afford adequate protection to effectively minimize the spray or splash of water or mud to the rear of the vehicle. This section shall not apply to those vehicles exempt from registration under Section 142 nor to any other vehicles having an unladen weight of under 1,500 pounds.

The provisions of subdivision (b) of Section 697 of this code shall not apply to a vehicle when the excess length is caused by any parts required to comply with this section. (Added by Stats 1951, ch 1218, sec. 1.)

Connecticut, Title 17, Chapter 110, Motor Vehicles, Section 1340d, General Statutes of Connecticut.

Fenders and Other Wheel Protectors. (a) No person shall operate on any public highway any motor vehicle *which the motor vehicle commissioner certifies as designed by the manufacturer to be equipped with fenders* unless such vehicle is so equipped. * * * (b) No person shall operate or cause to be operated any bus, truck, full trailer or semitrailer of registered gross weight exceeding three tons on any public highway unless the same is equipped with suitable metal protectors or substantial flexible flaps behind the rearmost wheels, and, in case the rear wheels are not [fol. 38] covered at the top and rear by fender, body or other parts of the vehicle, the rear wheels shall be covered at the top and rear by protective means of such standard type or design and so installed as to reduce, as far as practicable, such wheels from throwing dirt, water or other materials on the windshields of following vehicles, except in cases in which the motor vehicle is so designed and constructed that the above requirements are accomplished by reason of the fender or body construction or other means

of enclosure. This section shall not apply to vehicles *registered as farm vehicles or* where the construction thereof is such that complete freedom around the wheel area is necessary to secure the designed use of the vehicle. (c) Any person who violates any provision of this section shall be fined not more than fifty dollars or imprisoned not more than thirty days or both. (Emphasis as in Statute)

Idaho—Title 49—Motor Vehicles—Section 840, Idaho Code.

Requirement as to Fender or Covers Over All Wheels on Motor Vehicles—Penalty.—(a) It shall be unlawful for any person to operate, or move or any owner to permit to be operated or moved, any motor vehicle, motor truck, motor bus, bus trailer, semi-trailer or trailer, upon or over any public highway without having such vehicle equipped with fenders or covers which may include flaps or splash aprons, over and to the rear of wheels, as follows:

1. On the rear wheels of every motor truck equipped with a body, motor bus, bus trailer, semi-trailer or trailer such fenders or covers shall extend in full width from a point above and forward of the center of the tire or tires over and to the rear of the wheel or wheels to a point that is [fol. 39] not more than 10 inches above the surface of such highway when such vehicle is empty.

2. Behind the rear wheels of every motor truck not equipped with a body such fenders or covers shall extend downward in full width from a point not lower than halfway between the center of the wheels and the top of the tires on such wheels to a point that is not more than 10 inches above the surface of such highway when such vehicle is empty.

3. Behind all wheels of every motor vehicle other than motor trucks, motor buses, bus trailers, semi-trailers, or trailers, such fenders or covers shall extend in full width from a point above and forward of the center of the tire over and to the rear of the wheel to a point that is not more than 20 inches above the surface of such highway.

(b) Fenders or covers, as used in paragraph (a) of this section shall be deemed to be of sufficient size and con-

struction as to comply with the requirements thereof, if constructed as follows:

1. When measured on the cross sections of the tread of the wheel or on the combined cross-sections of the treads of multiple wheels, such fender or cover extends at least to each side of the width of the tire or of the combined width of the multiple tires, as the case may be; and

2. Such fender or cover is so constructed as to be capable at all times of arresting and deflecting such dirt, mud, water, or other substance as may be picked up and carried by such wheel or wheels.

(c) Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than five dollars ($5.00) nor more than one hundred dollars ($100.00), or by imprisonment in the county jail for a period of not more than 30 days, or by both such fine and im-[fol. 40] prisonment. (1953, ch. 273, Sec. 155.1, p. 478.)

Maine, Chapter 22—Motor Vehicles—Section 141A, Revised Statutes of Maine.

Splash Guards.—Every motor truck, trailer and semi-trailer operated in or upon any way shall be equipped with suitable guards which will effectively reduce the spray or splash to the rear of mud, water or slush caused by the rear wheels thereof, except that such guards shall not be required on any truck:

I. With a gross registered weight of 14,000 pounds or less; or

II. To dump trucks while working on construction or reconstruction projects in the area under construction; or

III. To a truck tractor when not hauling a trailer or semi-trailer.

The provisions of this section shall not apply to fire department vehicles. (1955, c. 339. 1957, c. 257.)

Massachusetts—Chapter 90—Motor Vehicles—Section 7, Annotated Laws of Massachusetts.

Brakes, Lights and Other Equipment.

* * * * * * *

Every motor vehicle or trailer, excepting motor vehicles or trailers owned and operated by the commonwealth or its political subdivisions and passenger motor vehicles, operated in or upon any way shall be equipped with suitable guards which will effectively reduce the spray or splash to the rear of mud, water or slush caused by the rear wheels thereof. (1954, 570, Sec. 1, appvd. June 7, 1954; by Sec. 2 of the Act it took effect on Jan. 1, 1955.) (No change in balance of section.)

[fol. 41] *Michigan*—Chapter 257—Motor Vehicles—Section 714a, Compiled Laws of Michigan.

Commercial Vehicle and Combination, Truck Tractor and Semi-Trailer, Construction and Operation: Flap Type Device.

Sec. 714a. On and after January 1, 1955, every commercial vehicle and every combination of a commercial vehicle and trailer or of a truck tractor and semi-trailer when used on a highway shall be so constructed or equipped, or so operated, as to bar water or other road surface substances thrown from the rear wheels of such vehicle or combination at tangents exceeding 22½ degrees measured from the road surface. If flap type device is used, it shall not have attached any type of lamp, reflective material or reflecting buttons; nor can device extend beyond the 96 inch maximum width of vehicle. (Added 1954, Act 168, Eff. Aug. 13.)

Minnesota—Section 169.733—Highway Traffic Regulations—Minnesota Statutes, 1953.

Wheel Flaps on Trucks and Trailers. Every truck, trailer and semi-trailer, excepting pole trailers and rear-end dump trucks, shall be provided with wheel flaps or other suitable protection above and behind the rearmost wheels of the vehicle or combination of vehicles to prevent,

as far as practicable, such wheels from throwing dirt, water, or other materials on the windshields of vehicles which follow. Such flaps or protectors shall have a ground clearance of not more than one-fifth of the horizontal distance from the center of the rearmost axle to the flap under any conditions of loading or operating of the motor vehicle and shall be at least as wide as the tires they are protecting. [fol. 42] . If the motor vehicle is so designed and constructed that the above requirements are accomplished by means of body construction or other means of enclosure, then no such protectors or flaps shall be required.

If the rear wheels are not covered at the top by fenders, body or other parts of the vehicle, the flap or other protective means shall be extended at least to a point directly above the center of the rearmost axle.

Lamps or wiring shall not be attached to fender flaps. (1951 c 640 s 1; 1953 c 619 s. 1)

Mississippi—Section 8256.5—Motor Vehicles—Mississippi Code Annotated.

Vehicles Transporting Persons or Property to Be Equipped With Protectors.

1. No person shall drive or operate or cause to be driven or operated, upon the public highways, streets, bridges and culverts within the State of Mississippi, or any subdivision thereof, any car, truck, truck-tractor, trailer or semi-trailer or bus used for the transportation of property or persons the gross weight of which, including load, exceeds ten tons unless such motor vehicle is equipped with suitable metal protectors or substantial flexible flaps on the rear-most wheels of such vehicle or combination of vehicles, so as to prevent as far as possible such wheels from throwing dirt, water and other materials on the windshields of following motor vehicles. Provided, however, that pole trailers, dump trucks, and all trucks carrying an "F" license tag shall be exempt from the provisions of this act.

2. Such protectors or flaps shall be constructed of substantial and suitable materials, approved by the Commissioner of Public Safety and shall have a ground clearance

[fol. 43] of not more than one-fifth of the distance from the center of the rear-most axle to the center of the flaps under any conditions of loading operation of the motor vehicle. They shall be at least as wide as the tires they are protecting. Provided, however, that if the motor vehicle is so designed and constructed that the purposes of this act cannot be met, in the discretion of the Commissioner of Public Safety, then no such protectors or flaps shall be required. Provided, further, that if the said rear-most wheels are not adequately covered at the top by fenders, body or other parts of the vehicle, the said protectors or flaps shall be extended to a point directly above the rear-most axle. Lamps or wiring shall not be attached to protectors or flaps, and any reflectors or reflectorized material attached to or made a part of the protectors or flaps shall be in addition to the reflectors required by law on the vehicle.

3. The Commissioner of Public Safety is hereby charged with the duty of administering the provisions of this act.

4. Any person convicted for a violation of any of the provisions of this act shall for the first violation thereof be punished by a fine of not more than Twenty-five Dollars ($25.00) or by imprisonment for not more than ten (10) days; for a second conviction such person shall be punished by a fine of not more than One Hundred Dollars ($100.00) or by imprisonment for not more than twenty (20) days.

Sources: Laws, 1954, ch. 338, Sec. 1-4 (Pars. 1-4), eff July 1, 1954.

[fol. 44] *Nebraska*—Section 39-735.01—Highways, Bridges and Ferries, 1955 Cumulative Supplement, Revised Statutes of Nebraska.

Splash Aprons: Requirements; Violation: Penalty.

Every new motor vehicle or semitrailer purchased after January 1, 1956, and operated on any highway in this state shall be equipped with fenders, covers, or devices, including flaps or splash aprons, unless the body of the vehicle affords adequate protection to effectively minimize the spray or splash of water or mud to the rear of the motor vehicle or semitrailer. Any person violating the provisions of this

section shall, upon conviction thereof, be fined in a sum not less than ten dollars nor more than one hundred dollars.

Source: Laws 1955, c. 160, sec. 1.
Effective date September 18, 1955.

New Hampshire—Section 263:21-a—Motor Vehicles—1955 Supplement, Revised Statutes of New Hampshire.

Flaps: Guards. Every motor truck, bus, trailer, semi-trailer, operated in or upon any way, shall be equipped with suitable flaps or guards which will effectively reduce the throw, spray or splash to the rear, of water, dirt or other matter, caused by the rear wheels thereof. Such flaps or guards required shall be of a type and size prescribed and approved by the commissioner of motor vehicles.

Source: 1955, 110:1, eff. Apr. 29, 1955.

New Jersey—Section 39: 3-79.1—Motor Vehicles—Revised Statutes Cumulative Supplement, New Jersey.

Metal Protectors or Flexible Flaps on Rear Wheels. No person shall operate or cause to be operated any bus, truck, full trailer or semi-trailer of registered gross weight ex-[fol. 45] ceeding three tons on any public highway unless the same is equipped with suitable metal protectors or substantial flexible flaps on the rearmost wheels, and, in case the rear wheels are not covered at the top by fender, body or other parts of the vehicle, the rear wheels shall be covered at the top by protective means, of such standard type or design and installed in such manner as shall be approved by the director of the division of motor vehicles in the department of law and public safety and as shall conform substantially to any requirements of the interstate commerce commission governing similar subject matter, in order to prevent, as far as practical, such wheels from throwing dirt, water or other materials on the windshields of the following vehicles, except in cases in which the motor vehicle is so designed and constructed that the above requirements are accomplished by reason of fender

or body construction or other means of enclosure; provided, however, this act shall not apply to pole trailers, dump trucks, tanks, or other vehicles where the construction thereof is such that complete freedom around the wheel area is necessary to secure the designed use of the vehicle.

Source: L. 1952, c. 343, Sec. 1, p. 1122, approved June 18, 1952, effective January 1, 1953.

New York—Section 15 (25)—Vehicle and Traffic Law, New York, 1956.

* * * * * * * *

25.(a) After January first, nineteen hundred fifty-seven, it shall be unlawful to operate on any public highway or street in this state any commercial motor vehicle, combination of a commercial motor vehicle and trailer, or combination of a truck-tractor and semi-trailer which is not so [fol. 46] constructed or equipped as reasonably to bar water or other road surface substances from being thrown by the rearmost wheels beyond the extreme rear of the vehicle or combination of vehicles, and to minimize side spray.

(b) Unless the commercial vehicle or combination vehicle is so designed or constructed to accomplish the objectives set forth in paragraph (a) of this subdivision by reason of fender or body construction or other means of enclosure, any such commercial vehicle or combination vehicle shall be equipped, on and after January first, nineteen hundred fifty-seven, with splash guards and stone deflectors which shall be composed of materials substantial enough to withstand ripping or tearing by ordinary means and withstand the action of the elements for a reasonable length of time. Such splash guards and stone deflectors shall also have a reasonable degree of flexibility and the distance from the lower end thereof to the ground shall not exceed one-third of the distance, measured along the ground, from the bottom of the splash guard to the point of contact of the rear wheel.

(c) The Commissioner of motor vehicles is hereby authorized and empowered to make rules and regulations

with respect to splash guards and stone deflectors, their type and construction, manner of attachment to vehicles and all other matters requisite for the proper effectuation of the purposes of this subdivision. In making such rules and regulations the commissioner shall be guided by the desirability of uniformity in requirements with regard to splash guards and stone deflectors among the several states.

Sec. 2. This act shall take effect immediately.

[fol. 47] *Ohio*—Section 7250-3, Ohio General Code, 1953.

No person shall drive or operate or cause to be driven or operated, any commercial car, trailer or semi-trailer used for the transportation of goods or property, the gross weight of which, with load, exceeds three tons, upon the public highways, streets, bridges and culverts within the state of Ohio or any subdivision thereof, unless such vehicle is equipped with suitable metal protectors or substantial flexible flaps on the rear-most wheels of such vehicle or combination of vehicles to prevent as far as practicable such wheels from throwing dirt, water or other materials on the windshields of following vehicles; such protectors or flaps shall have a ground clearance of not more than one-fifth of the distance from the center of the rear-most axle to the center of the flaps under any conditions of loading of the motor vehicle, shall be at least as wide as the tires they are protecting; provided, however, that if the motor vehicle is so designed and constructed that the above requirements are accomplished by means of fenders, body construction or other means of enclosure, then no such protectors or flaps shall be required; and further provided that rear wheels not covered at the top by fenders, bodies or other parts of the vehicle shall be covered at the top by protective means extending at least to the center line of the rear-most axle.

Any person found guilty of a violation of this section shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than fifty dollars. (Section 7250-3, Ohio General Code as amended by H. B. 24, Laws of 1953.)

[fol. 48] *Oklahoma*—Section 148 (a-3)—Motor Vehicles—Revised Statutes of Oklahoma, 1955 Supp.

* * * * * * *

All trucks, trailers, and other vehicles, operating on the highways, except animal drawn vehicles, not equipped with fenders over the rearmost wheels shall have attached thereto a rubber or fabric apron directly in rear of the rearmost wheels, and hanging perpendicular from the body of the vehicle, said apron shall be of such a size as to prevent the bulk of the spray of other substances, picked up from the roadway, from being thrown on the windshield of a following vehicle and thereby obscuring the vision through the windshield of the driver of said vehicles, provided the provisions of this Section shall not apply to a farm tractor moving over the State Highway system at a speed less than twenty (20) miles per hour.

Oregon—Section 483.438—Vehicles and Small Watercraft—Oregon Revised Statutes, 1955.

Fenders or Covers on Motor Vehicles. No person shall operate or move, and no owner shall permit to be operated or moved, any motor vehicle, motor truck, motor bus, semitrailer or truck trailer, as defined in ORS 481.030 to 481.065, or bus trailer, as defined in ORS 483.002, except a motor truck chassis not equipped for hauling a load or a semitrailer equipped with bunks, upon or over any public highway, without having such vehicle equipped with fenders or covers, which may include flaps or splash aprons, over and to the rear of wheels, as follows:

(1) On the rear wheels of every motor truck equipped with a body, motor bus, bus trailer, semitrailer or trailer, such fenders or covers shall extend in full width from a point above and forward of the center of the tires over and to the rear of the wheels to a point that is not more than 10 inches above the surface of the highway when the vehicle is empty.

[fol. 49] (2) Behind the rear wheels of every motor truck not equipped with a body the fenders or covers shall ex-

tend downward in full width from a point not lower than halfway between the center of the wheels and the top of the tires on such wheels to a point that is not more than 10 inches above the surface of the highway when such vehicle is empty.

(3) Behind all wheels of every motor vehicle other than motor trucks, motor busses, bus trailers, semitrailers or trailers, the fenders or covers shall extend in full width from a point above and forward of the center of the tire over and to the rear of the wheel to a point that is not more than 20 inches above the surface of the highway.

Pennsylvania—Section 407.1, Title 75—Vehicles—Purdon's Revised Statutes of Pennsylvania.

Equipment to Restrict Throwing of Substances by Rear Wheels. Every commercial motor vehicle, and every combination of a commercial motor vehicle and trailer, or of a truck tractor and semi-trailer, when used on a highway, shall be so constructed or equipped as to bar water or other road surface substances thrown from the rear wheels of such vehicle or combination at tangents exceeding twenty-two and one-half (22½) degrees, measured from the road surface, from passing in a straight line to the rear of such vehicle or combination.

Penalty.—Any person violating any of the provisions of this section shall, upon summary conviction before a magistrate, be sentenced to pay a fine of ten ($10) dollars and costs of prosecution, and in default of the payment thereof, shall undergo imprisonment for not more[1] five days. 1929, May 1, P.L. 905, art. VIII, Sec. 820.1, added 1951, Aug. 24, P.L. 1350, Sec. 1.

[fol. 50] *Rhode Island*—Section 31-23-27—Motor Vehicles—General Laws of Rhode Island, 1956.

Rear Wheel Flaps on Buses, Trucks, and Trailers. No person shall operate or cause to be operated any bus, truck, full trailer or semitrailer of registered gross weight ex-

[1] Word "than" probably should be inserted.

ceeding three (3) tons on any public highway in this state unless the same is equipped with suitable metal protectors or substantial flexible flaps behind the rearmost wheels, and, in case the rear wheels are not covered at the top and rear by fender, body or other parts of the vehicle, the rear wheels shall be covered at the top and rear by protective means of such standard type or design and so installed as to reduce, as far as practicable, such wheels from throwing dirt, water or other materials on the windshields of following vehicles, except in cases in which the motor vehicle is so designed and constructed that the above requirements are accomplished by reason of the fender or body construction or other means of enclosure; provided, however, Sec. 31-23-26 to 31-23-28, inclusive, shall not apply to vehicles where the construction thereof is such that complete freedom around the wheel area is necessary to secure the designed use of the vehicle.

History of Section P.L. 1950, ch. 2595, art. 34, Sec. 41, as enacted by P.L. 1955, ch. 3539, Sec. 1.

Tennessee—Section 59-928, Motor and Other Vehicles, Tennessee Code Annotated, 1957 Supp.

Mud-guards on Trucks. No person shall operate upon a public highway or street any motor vehicle or combination of vehicles having a carrying capacity in excess of three thousand (3,000) pounds, which motor vehicle or combination of vehicles is not equipped with rear fenders, mud-flaps, or mud-guards which shall be of such size as will substantially prevent the projection of rocks, dirt, water [fol. 51] or other substances to the rear. Such fenders, flaps or guards shall be of a type approved by the commissioner of safety.

This section shall have no application to farm vehicles, or vehicles used by farmers to haul produce from farm to market, nor shall it apply to vehicles used exclusively for hauling logs.

Any person, firm or corporation violating the provisions of this section shall be guilty of a misdemeanor which shall be punishable by a fine of not less than ten dollars ($10.00) nor more than fifty dollars ($50.00). Acts 1955, ch. 227, Sections 1-3.)

Texas—Section 139a, Art. 6701d, Vernon's Annotated Texas Statutes, 1956 Supp.

Safety Guards or Flaps Behind Rear Wheels of Tractors, Trucks, etc.

It shall be unlawful to operate any road tractor, truck, truck-tractor, trailer or semitrailer, having four (4) or more tires on the rear axle thereof upon any highway in this State when the highway upon which the same is operated is wet unless such road tractor, truck, truck-tractor, trailer or semitrailer be equipped with safety guards or flaps of a type of material and construction prescribed by the department, located and suspended behind the rear wheels of such vehicle to within six (6) inches of the surface of the highway so as to prevent mud and road-slush from the tires of such vehicle being transmitted to the windshield of any following motor vehicle following at a distance of not less than one hundred (100) feet. Provided, however, that "pole trailers" shall not come under the provisions of this Act. Added Acts 1951, 52nd Leg., p. 854, ch. 479, Sec. 1.

[fol. 52] *Utah*—Section 41-6-150.10—Motor Vehicles—Utah Code Annotated, 1957 Supp.

Guards or Flaps at Rear Wheels of Trucks, Trailers, or Truck-Tractors.

It shall be unlawful for any truck, truck-tractor, trailer, or semitrailer which is the rearmost vehicle in any combination of vehicles, not to be equipped with suitable metal protectors or substantial flexible flaps behind the rearmost wheels to prevent, as far as practicable, such wheels from throwing dirt, water, or other materials on the windshields of vehicles following when said vehicles are operated on a public highway.

(1) Such protectors or flaps shall have a ground clearance of not more than fifty per cent (50%) of the diameter of a rear-axle wheel, under any conditions of loading of the vehicle; or,

(2) Such protectors or flaps shall have a ground clearance of not more than one-fifth of the distance from the

center of the diameter of the rearmost axle directly in front of the flaps, to the flaps under any conditions of loading of the motor vehicle.

Such flaps shall be at least as wide as the tires they are protecting and directly in line with said tires; provided, however, that if the motor vehicle is so designed and constructed that the above requirements are accomplished by means of fenders, body construction, or other means of enclosure, then no such protectors or flaps shall be required; and further provided that rear wheels not covered at the top by fenders, bodies, or other parts of the vehicle shall be covered at the top by protective means extending rearward at least to the center line of the rearmost axle.

[fol. 53] *Wisconsin*—Section 85.45 (6)—Vehicles in Traffic—Wisconsin Statutes.

Rear Fenders or Mud Guards. No person shall operate a privately owned straight truck or semitrailer drawn by a truck-tractor in intercity movement, except when equipped with dump bodies, upon the public highways of this state unless the same is equipped with rear fenders capable of restricting to a minimum the splashing of water, mud and other matter upon the windshields of following vehicles or, in lieu of such fenders, with mud guards constructed and placed to serve the same purpose. To effectuate the purposes of this section, the motor vehicle department shall promulgate rules by September 1, 1953, prescribing standards for adequate rear fenders and for the construction, design and installation of suitable mud guards and shall publish such rules in pamphlet form. Whoever violates this section or any rule implementing it shall be punished as provided by s. 85.91 (1).

Virginia—Section 46-294.1, Code of Virginia, 1956, Cum. Supp.

Rear Fenders, Flaps or Guards Required for Certain Motor Vehicles. No person shall operate upon a highway any motor vehicle or combination of vehicles having a carrying capacity in excess of twenty-two thousand five hundred pounds which motor vehicle or combination of

vehicles is not equipped with rear fenders, flaps or guards which shall be of such size as will substantially prevent the projection of rocks, dirt, water or other substances to the rear. Such fenders, flaps or guards shall be of a type approved by the Superintendent of State Police. Vehicles used exclusively for hauling logs shall be exempt from the provisions of this section. (1954, c. 403.)

[fol. 54] *Washington*—Section 46.36.130—Motor Vehicles—Revised Code of Washington.

Escape of Load Materials—Fenders.

* * * * * * * *

Every vehicle shall be equipped with a device adequate to effectively reduce the wheel spray or splash of water from the roadway to the rear thereof. (1947, c. 200 Sec. 3; 1937, c. 189 Sec. 44; Rem. Supp. 1947, Sec. 6360-44.)

[File endorsement omitted]

[fol. 55] Certificate of Service (omitted in printing).

[fol. 56]

In the United States District Court for the Southern District of Illinois

Southern Division

[Title omitted]

Petition Supplementing Complaint in Support of Plaintiffs' Motion for Temporary Injunction—Filed December 18, 1957

Now comes your petitioner, Watson Bros. Transportation Co., Inc., by Jim Crosby, and represents unto this Court as follows:

1. That the undersigned is the duly authorized agent of Watson Bros. Transportation Co., Inc., one of the plaintiffs in the above captioned matter.

2. That he has full knowledge of the facts set forth in the complaint heretofore filed by the plaintiffs herein, and that said facts are true both in substance and in fact.

3. That in addition to the facts alleged in said complaint in support of plaintiffs' motion for temporary injunction upon which plaintiffs will rely upon hearing of said motion, certain other facts which further justify the granting of a temporary injunction have come to the attention of plaintiffs, and plaintiffs will be prepared to offer evidence of said facts in open court in support of their motion.

[fol. 57] 4. That since the filing of the instant action plaintiffs have learned that the Secretary of State of Illinois and the Secretary of the Michigan Reciprocity Board have entered into a reciprocity agreement which will permit motor carriers in interstate commerce who are residents of Michigan to use the highways of the State of Illinois without complying with Section 121.02 of the Uniform Act Regulating Traffic on Highways, being Section 218b of Chapter 95½ (Illinois Revised Statutes), which requires such carriers to equip their trailers with the so-called contour splash guard, as more fully appears in plaintiffs' complaint. Said reciprocity agreement is evidenced by correspondence between the Secretary of State of Illinois and the Secretary of the Michigan Highway Reciprocity Board hereto attached as plaintiffs' "Exhibits 1, 2 and 3."

5. That said agreement between Illinois and Michigan permitting motor carriers in interstate commerce who are residents of the State of Michigan to operate on Illinois highways without the contour type splash guard clearly establishes that there is no urgent safety need in Illinois requiring that carriers equip their trailers with the contour splash guard, since it is the intent and purpose of the agencies administering said Act to permit innumerable carriers from at least one state (presumably other states will endeavor to enter into similar reciprocity agreements with Illinois) to continue to operate without contour splash guards.

6. That since it is obvious that the residence of a carrier can have no effect upon the amount of back splash caused by its trailers on Illinois highways, officials of the State of Illinois charged with the administration of the Act cannot urge that the granting of plaintiffs' motion for a temporary injunction will in any way interfere with their

ability to cope with an immediate need. They have admitted by signing an agreement which will permit innumerable Michigan carriers to use the highways of Illinois without contour splash guards that said guards are not urgently needed in the interests of safety.

[fol. 58] 7. That as set forth in great detail in plaintiffs' complaint, a denial of the plaintiffs' motion will result in immediate and irreparable harm to plaintiffs, who will be required to immediately expend large sums of money for equipment and who face the prospect of losing a large percentage of their interline business, which a later granting of the permanent relief sought in said complaint will not rectify.

8. That in paragraph 25 of their complaint plaintiffs allege that because of the great particularity with which the Illinois Act describes the contour splash guard, there is a danger that if all other States or any other State attempted to exercise the same power to describe equipment particularly, it would be impossible to operate in interstate commerce pursuant to the authority granted to them by the Interstate Commerce Commission.

9. That since the filing of their complaint herein plaintiffs have learned that the Indiana Reciprocity Committee has wired the Secretary of State of Illinois with regard to the use of contour splash guards on Indiana highways. It is petitioner's information and belief that said telegram is as follows:

"To Honorable Charles W. Carpentier
Secretary of State, State House
Springfield, Illinois

"Congratulations on working out a reciprocal agreement with Michigan covering mutual recognition of the different type mud flaps. Indiana licensed interstate trucks are equipped with conventional type. Therefore we would like to enter into a similar agreement covering this type of equipment similar to your Michigan agreement. If interested answer by Western Union and forward proposed draft. Will execute promptly

and return. Signed: Indiana Reciprocity Commission, Robert L. McMahan, Chairman and Commissioner of Motor Vehicles."

Indiana law requires that safety devices such as mudflaps must be approved by the Director of Safety of Indiana. It is plaintiffs' information and belief that unless a reciprocity agreement can be entered into between Indiana and Illinois, Indiana will not approve the use of the contour [fol. 59] mudflap on vehicles operating over its highways.

10. That to date it is petitioner's information and belief that no reciprocity agreement has been entered into between the State of Illinois and Indiana, and, therefore, plaintiffs will suffer immediate and irreparable harm unless the Court enters a temporary injunction, because they will be compelled to equip their trailers with contour splash guards which may not be permitted in Indiana. Said Act will thereby prevent plaintiffs from operating between points in Indiana and Illinois or through both Indiana and Illinois destined for other points, thereby constituting an unreasonable and undue burden upon the free flow of interstate commerce.

Wherefore, your petitioner respectfully prays that this Court enter a temporary restraining order enjoining and restraining the defendants, and their agents, attorneys and employees, and each and every one of them, from enforcing or instituting proceedings to enforce Section 121.02 of the Uniform Act Regulating Traffic on Highways, being Section 218b of Chapter 95½ (Ill. Rev. Stat.), as amended, against plaintiffs herein pending hearing and determination of the issues presented by the instant action by the full Court pursuant to Title 28, Section 2284, of the United States Code.

/s/ Jim Crosby, Duly authorized agent of Watson Bros. Transportation Co., Inc.

Duly sworn to by Jim Crosby, jurat omitted in printing.

[File endorsement omitted]

[fol. 60]

EXHIBIT 1 TO PETITION

(Letterhead of Public Service Commission, Lansing, Michigan)

November 27, 1957

Hon. Charles F. Carpentier
Secretary of State
State House
Springfield, Illinois

Dear Secretary:

This will acknowledge your letter of November 19, 1957 advising of your decision to recognize vehicles owned by Michigan residents equipped with Mud flaps meeting the requirements of Michigan law when operating into or through your state.

In turn, Michigan will recognize vehicles owned by Illinois residents when such Illinois licensed vehicles are equipped with mudguards meeting Illinois law.

We are very pleased you acted favorably to our letter of proposal under date of August 14th and that reciprocity with respect to mudguards and/or mud flaps will extend to the citizens of each of our states when operating in the other state.

Very truly yours,

P. N. Van Lopik, Secretary
Michigan Highway Reciprocity Board

PNV:pb

[fol. 61]

EXHIBIT 2 TO PETITION

(Emblem)

OFFICE OF THE SECRETARY OF STATE
SPRINGFIELD

CHARLES F. CARPENTIER
SECRETARY OF STATE

November 19, 1957

Mr. P. N. Van Lopik
Transportation Division
Public Service Commission
Lansing 13, Michigan

Dear Mr. Van Lopik

You recently inquired as to the possibility of the States of Michigan and Illinois undertaking an exchange of letters with respect to the mudguard requirements of our respective states.

Pursuant to your inquiry we have discussed this matter informally with the Chief of the Illinois State Police and the Attorney General of the State of Illinois and wish to advise you that the Illinois State Police will not require compliance with the Illinois Mudguard Act for trucks operated in Illinois if owned by Michigan residents and properly licensed in the State of Michigan, provided that such vehicles are equipped with mudguards meeting the requirements of Michigan Law.

It is our understanding that the State of Michigan in return will not require compliance with the Michigan Mudguard Act for Illinois trucks operated in Michigan by Illinois residents and properly registered in the State of Illinois, equipped with mudguards meeting Illinois Law.

Please advise us of your receipt of and agreement to the terms of this letter.

Very truly yours,

Charles F. Carpentier
Secretary of State

CFC:mg

[fol. 62]

EXHIBIT 3 TO PETITION

(Letterhead of Public Service Commission, Lansing, Michigan)

August 14, 1957

Mr. Charles F. Carpentier
Secretary of State
Office of the Secretary of State
Springfield, Illinois

Dear Mr. Carpentier:

Much publicity has been noted in news columns relative to the requirement of mud flaps on vehicles engaged in interstate commerce.

The Michigan statute which differs from Illinois law requires a conventional flat flap only when such vehicle is throwing refuse, water or mud. Therefore, under favorable circumstances a flap would not be required or in the absence of one would not be a violation.

Interstate carriers domiciled in Michigan and operating into Illinois would be in compliance with the requirements of our laws, but would not meet Illinois requirements as to a contour mud-guard.

In view of the circumstances, it is suggested by exchange of letters reciprocity be extended to Illinois carriers operating vehicles equipped with contour mud guards and inturn, Illinois recognize and extend reciprocity to Michigan carriers when their vehicles are equipped with the conventional flat flap or when in conformance with Michigan regulations.

A similar arrangement with the State of New York was effectuated at a Northeastern National meeting held at Harrisburg, Pennsylvania last November.

Very truly yours,

P. N. Van Lopik, Secretary
Michigan Highway Reciprocity Board

PNV:pb

[fol. 64]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

SOUTHERN DIVISION

Civil Action No. 2438, In Chancery

NAVAJO FREIGHT LINES, INC.,
a New Mexico Corporation,

RINGSBY TRUCK LINES, INC.,
a Nebraska Corporation,

PRUCKA TRANSPORTATION, INC.,
a Nebraska Corporation,

DENVER CHICAGO TRUCKING CO., INC.,
a Nebraska Corporation,

WATSON BROS. TRANSPORTATION CO., INC.,
a Nebraska Corporation,

and

PACIFIC INTERMOUNTAIN EXPRESS CO.,
a Nevada Corporation, Plaintiffs,

vs.

JOSEPH D. BIBB, Director of the Department of Public Safety of the State of Illinois

and

WILLIAM H. MORRIS, Superintendent of the Division of State Highway Police, Department of Public Safety of the State of Illinois, Defendants.

PRELIMINARY RESTRAINING ORDER—December 18, 1957

This cause coming on to be heard on the complaint and petition of the plaintiffs, Navajo Freight Lines, Inc., Ringsby Truck Lines, Inc., Prucka Transportation, Inc., Denver Chicago Trucking Co., Inc., Watson Bros. Transportation Co., Inc. and Pacific Intermountain Express Co., for a preliminary restraining order pending the hearing of the case

before a statutory Three-Judge Court, and the Court having jurisdiction of both the parties and the subject matter, and being fully advised in the premises, and having heard the arguments of Counsel in open Court:

It Is Hereby Ordered, Adjudged and Decreed that the defendants, Joseph D. Bibb, Director of the Department of Public Safety of the State of Illinois and William H. Morris, Superintendent of the Division of State Highway Police, Department of Public Safety of the State of Illinois, and each of them, their successors in office and their agents, servants, attorneys and employees be and they are hereby restrained and enjoined from instituting any proceedings of any kind or nature whatsoever against the plaintiffs herein for violations of Section 121.02 of the Uniform Act Regulating Traffic on Highways, being Section 218b of Chapter 95½, Illinois Revised Statutes, as amended, by Act approved July 8, 1957, until further order of this Court.

/s/ Chas. G. Briggle, District Judge.

December 18th, 1957.

[File endorsement omitted]

[fol. 73]

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

SOUTHERN DIVISION

[Title omitted]

ORDER OVERRULING MOTION TO DISMISS—January 15, 1958

Comes now the parties to the above-entitled cause by their respective attorneys, and said cause coming on for trial before a three-Judge Court, the Court heard opening statements of counsel, and evidence on behalf of Plaintiffs' and Intervenor, and at the conclusion thereof, Defendants move the Court to Dismiss this action, which motion is overruled by the Court; evidence on behalf of defendants heard in part, and the hour of adjournment having arrived, the further trial hereof is postponed until 9:00 o'clock A.M. tomorrow.

[fol. 74]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

SOUTHERN DIVISION

[Title omitted]

DEFENDANTS' MOTION TO DISMISS AT CLOSE OF PLAINTIFFS' EVIDENCE—Filed January 15, 1958

Now come the defendants, Joseph D. Bibb, Director of the Department of Public Safety of the State of Illinois, and William H. Morris, Superintendent of the Division of State Highway Police, Department of Public Safety of the State of Illinois, at the close of plaintiffs' and intervenor's evidence, and, pursuant to Rule 41(b) of the Federal Rules of Civil Procedure, move the court to dismiss this action [fol. 75] upon the ground that upon the facts and the law the plaintiffs and intervenor have shown no right to relief.

Joseph D. Bibb, Director of the Department of Public Safety of the State of Illinois,

William H. Morris, Superintendent of the Division of State Highway Police, Department of Public Safety of the State of Illinois, Defendants, By /s/ Latham Castle, Attorney General, State of Illinois, Supreme Court Building, Springfield, Illinois, By /s/ Richard W. Husted, Assistant Attorney General.

[File endorsement omitted]

[fol. 76]

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

SOUTHERN DIVISION

[Title omitted]

Transcript of Proceedings of January 15, 1958

Proceedings had and evidence taken in the above-entitled cause before the Honorables Charles G. Briggle, Frederick O. Mercer and J. Earl Major, Judges of said Court, in the Courtroom in the United States Court House at Springfield, Illinois, on the 15th day of January, A. D. 1958, at ten o'clock A. M.

APPEARANCES

Present: Axelrod, Goodman & Steiner, By Messrs. David Axelrod, Carl Steiner and Arnold Burke, 39 South LaSalle Street, Chicago, Illinois, Appeared for the Plaintiffs;

[fol. 77] Mr. Latham Castle, Attorney General of the State of Illinois, By Mr. Richard W. Husted, State Office Building, Springfield, Illinois, Appeared for Defendants;

Stephenson & Routman, By Messrs. Mack Stephenson and Melvin N. Routman, 208 East Adams Street, Springfield, Illinois, Appeared for Intervenor.

Richard L. Orey, Official Court Reporter.

[fol. 79] PROCEEDINGS

Judge Briggle: Case of Navajo Freight Lines versus Bibb, et al., No. 2438, is called for hearing. Are you ready for the Plaintiffs?

Mr. Axelrod: We are ready, Your Honor.

Judge Briggle: Ready for the Defendant?

Mr. Husted: Defendants are ready, Your Honor.

Judge Briggle: Let's see, Mr. Axelrod is representing the Plaintiffs and Mr. Husted from the Attorney General's Office. Any other attorneys?

Mr. Stephenson: Mack Stephenson, Your Honor.

Judge Briggle: You represent?

Mr. Stephenson: Arkansas-Best Freight System, Incorporated.

Judge Briggle: Arkansas Motor Freight Lines was in error, and that has been corrected, is that correct, and the proper name is Arkansas-Best Freight Lines?

Mr. Stephenson: Arkansas-Best Freight System, Inc.

Judge Briggle: All right.

Mr. Axelrod: I have given the Court Reporter the appearance of Mr. Carl Steiner and Mr. Arnold Burke, who are associated with me in this matter likewise.

Judge Briggle: Very well. Anyone else on appearances here, Mr. Husted?

Mr. Husted: No, Your Honor.

[fol. 80] Judge Briggle: The panel, Judge Major and Judge Mercer, gentlemen. They are experts in your field and will undertake to answer all your questions. You may proceed.

Opening Statement of Mr. Axelrod

Mr. Axelrod: May it please the Court, the complaint in this proceeding attacks the constitutionality of the 1957 Illinois Contour Mudflap Statute on the ground that that Statute unduly burdens and obstructs interstate commerce.

For the benefit of the Court, may I ask the Clerk, please, to mark for identification two pictures as Exhibit No. 1. These will later be identified through an appropriate witness. I have given Mr. Husted a copy of both of these photographs, if Your Honors please.

If the Court please, for the purpose of information, Exhibits 1 and 2 are pictures of what is known as a contour mudflap, this Statute as such which is under attack in this proceeding.

May I show to the Court, for information, the other type of mudflap which we will be labeling in this proceeding as the conventional or straight type of mudflap, and may I show you two pictures of a vehicle of the Pacific Intermountain Express Company. I don't have extra copies of these pictures. I will and can supply them.

Judge Briggle: What did you say Exhibit 1 was?

[fol. 81] Mr. Axelrod: Exhibits 1 and 2 both are pictures of the contour mudflap. They are different views of the same mudflap, as a matter of fact.

Judge Major: Those are the mudflaps as called for by this Statute?

Mr. Axelrod: That's correct, Your Honor.

May I show the Court two pictures marked for identification as Exhibit No. 3. The pictures in Exhibit 3, the two of them, Your Honors, show the straight mudflap, we call it sometimes the conventional mudflap. Prior to 1957, and prior to 1955, when a prior contour mudflap Statute was on the books, this was the kind of mudflap which was required by the Illinois Statute, and it is this kind of mudflap as shown in Exhibit No. 3 which is the mudflap which is generally accepted throughout the United States and is in conformity with the Statutes of all of the other states except Illinois, now under the Illinois Contour Mudflap Statute.

It's our position in this proceeding, as I have indicated, that the Contour Mudflap Statute is a statute which unduly obstructs and burdens interstate commerce, and that not only does it do that from the standpoint of burden and obstruction, but that in fact the Contour Mudflap Statute is one which creates hazards and dangers on the highways, not only of Illinois, but of other states in the [fol. 82] country, and that it therefore should fall under attack in this Court.

I'd like to proceed with my evidence, if I may, please.

Judge Briggle: Any opening statement desired by the other side?

Opening Statement of Mr. Husted

Mr. Husted: If you please, Your Honor.

If it please the Court, the position of the Defendants, Your Honors, is that this is a most reasonable exercise of the police power of the State of Illinois; that it not only is reasonable, but vitally necessary; that is, there is a very real problem threatening the safety of persons and property on the highways, which needs correcting insofar as it can be corrected practically.

Examination of this Statute will show that it is not discriminatory in any way against interstate commerce, the operations alike on all vehicles whether in intra or interstate commerce.

I think it will be demonstrated here that Congress has not entered this field at all, not only hasn't preempted the field, but hasn't even entered the field. We shall demonstrate, if Your Honors please, that not only that this Statute and compliance with it does not interfere with interstate commerce, but that by reducing and minimizing a most serious obstacle to the free flow of traffic on the [fol. 83] highways, actually, both intra and interstate commerce and traffic will be expedited. Thank you.

Judge Briggle: You may proceed with your evidence.

Mr. Axelrod: May I call Mr. Crosby, please.

JIM CROSBY called as a witness by and in behalf of the Plaintiffs herein, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Axelrod:

Q. Would you be good enough to state your name and address, please?

A. My name is Jim Crosby; my address is Omaha, Nebraska.

Q. Mr. Crosby, with what company are you associated?

A. Watson Bros. Transportation Co., Inc.

Q. What is the business of Watson Bros.?

A. Watson Bros. is a motor common carrier of general commodities operating in interstate commerce, primarily.

Q. Mr. Crosby, what position do you hold with Watson Bros., and will you state what your duties and responsibilities are in connection with that position?

A. My position is general traffic manager of the com- [fol. 84] pany. The duties and requirements of that position are responsibility of the entire traffic field of our company, which includes rates, which includes matters before various jurisdictional bodies such as the Interstate

Commerce Commission, State and local jurisdictional bodies, the responsibilities of obtaining certificates of public convenience and necessity, and the responsibility for defending such certificates or permits upon attack.

There is also the responsibility of the Traffic Department to be responsible for the expansion program of our company, and also to resist the efforts of competitive carriers to enter service into the field in which we operate. There are many other responsibilities that would be too numerous to mention, but include the service that our company provides to the public, and "service" is a very broad term.

Q. Mr. Crosby, does your company operate pursuant to authority held by it from the Interstate Commerce Commission?

A. Yes.

Q. I show you what has been marked for identification as Exhibit No. 4, a copy of the certificate of public convenience and necessity, and ask you if that is a true and correct copy of the operating authority of Watson Bros. as held by it from the Interstate Commerce Commission? [fol. 85] A. It is.

Q. Mr. Crosby, under that certificate, are you required to provide reasonably adequate and continuous service as a specific condition?

A. Yes, we are, and I believe the certificate at one point outlines what that responsibility is.

Judge Major: What exhibit?

Mr. Axelrod: That is Exhibit No. 4, Judge Major.

The Witness: Yes, sheet 24, about the center of the page outlines that.

By Mr. Axelrod:

Q. Would you be good enough to call attention to the Court of the specific condition of your I.C.C. certificate?

A. Yes. Referring to sheet 24 of Exhibit 4, near the center of the page, it states "It is further ordered and is made a condition of this certificate that the holder thereof shall render reasonably continuous and adequate service to the public in pursuance of the authority herein granted.

and that failure to do so shall constitute sufficient grounds for suspension, change or revocation of this certificate."

While this appears on sheet 24 it does not appear following the sub numbers beginning on sheet 25, it nevertheless is just as binding upon the sub numbers, because the subs are in fact a part of the original certificate, and [fol. 86] the sub orders of the sub certificates do contain the same provision.

Q. When you refer to the "sub orders," you are referring to the authorities that are shown on page 25 and the subsequent pages, is that correct?

A. Yes, sir.

Mr. Axelrod: I have distributed to the Court and asked the Clerk to please mark for identification a map as Exhibit No. 5.

Q. Mr. Crosby, I direct your attention to a map which has been marked for identification as Exhibit No. 5. Would you be good enough to explain that, sir?

A. Yes. This is a map depicting the operations authorized by our certificate which has been identified as Exhibit 4. It must be explained that this map is an advertising map drawn best to emphasize the thing that we wish to emphasize, and we have taken a little liberty with the United States map. It is quite accurate up to the point of Grand Junction, Colorado, which is in the center of the map.

The continuing line to the west is for the purpose of emphasizing the Oakland Bay area and the Los Angeles area. However, the actual operations would be south to Gallup, New Mexico, and thence west.

Q. Mr. Crosby, directing your attention to your exhibit [fol. 87] covering the certificate issued to you by the Commission, will you tell us whether or not the highways in Illinois over which you are authorized to traverse are United States highways?

A. Yes, they are.

Q. I direct your attention to the map, Exhibit No. 5. Would you be good enough to indicate what the thin lines refer to?

A. The thin lines, for example, using Chicago, Illinois, the thin lines indicate service via a connecting carrier.

Q. What is a connecting carrier, Mr. Crosby?

A. A connecting carrier, perhaps I should explain it this way: Watson Bros. is authorized to operate within a specific territory, and we, at Watson Bros., handle several different types of traffic. For example, a shipment originating and terminating on Watson's line and handled exclusively by Watson would be considered an on-line shipment.

A shipment originating on Watson's line, for example, at Los Angeles, California, and destined to New York City is a shipment which we are not authorized to transport all the way from origin to destination. Therefore, we transport the shipment in our trailer to Chicago, Illinois, for example. Then, we interchange that trailer; we physically hand or give that trailer to the connecting line [fol. 88] who pull it to final destination.

Therefore, at Chicago, all of those lines would indicate service via connecting carriers who connect with us to form a through transportation service.

While there are several lines shown on the map, it would be, of course, impossible to show all that would depict the actual interchange service that we have.

Q. Is the interchange service which you provide with the connecting carriers a substantial and integral part of the service which you offer to the shipping public under your I.C.C. certificate?

A. Yes, it most certainly is.

Q. I'd like to direct your attention now to the next exhibit which has been marked for identification as Exhibit No. 6.

Your Honors, it's the brochure of Watson Bros. Transportation Company, which is identified as the Chicago Station list.

Will you explain what that brochure is, Mr. Crosby?

A. Yes. Exhibit 6 is prepared specifically for shippers and receivers of freight in the Chicago area, and we have brochures like this for all of our major terminals. Perhaps I should say, for each of our major terminals.

It shows the service that we advertise and daily perform [fol. 89] between Chicago, Illinois, and that area on the one hand, and the other state listed throughout the brochure. I might point out that in connection with each state listed we have individual maps shown therein which further demonstrate the type of service we offer.

For example, I would refer to the map immediately following sheet No. 32, which emphasized direct trailer service to Washington state, and depicts a Watson trailer at the dock of a Chicago shipper. Then, the picture at the bottom page depicts that same Watson trailer parked at the dock of the Washington Tree Company in the State of Washington.

Q. Is Watson Bros. under its own certificate authorized to serve the State of Washington?

A. No, it is not.

Q. How would Watson Bros. provide this direct trailer service that it advertises and shows on page No. 33 of Exhibit No. 6 into Washington?

A. We would load the equipment at Chicago, Illinois, and then move that equipment to one of our interchange points, most likely Denver, Colorado, in this case, and then we would tender that trailer, loaded with its cargo, to our connecting line, and then that connecting line, and possibly its connecting lines, would pull the trailer to final destination. That could be a Watson trailer, or it [fol. 90] could be trailers of many other carriers that we possess in interchange service and would use for such a movement.

Q. I want to direct your attention to the picture opposite page 30 with reference to service you hold out and provide into Utah and ask you whether or not that is the same situation that you have just described except applicable to the State of Utah?

A. Yes, sir, it is.

Q. And is it true that you don't have authority to serve Utah directly?

A. That's correct. We have one route that goes through the State of Utah, but does not provide, or does not permit, us to provide any service in the State of Utah.

Q. May I call your attention to the first, what would be the first page of this exhibit No. 6 and ask you whether or not you blazen out, so to speak, and emphasize "through trailer service" to every major city in the United States?

A. Yes, sir, we have.

Q. Does the second page of this exhibit indicate the locations of your various terminal facilities?

A. Yes, sir.

Q. And I direct your attention to what would be the third page of this exhibit, which is headed "through trailer service" to all major points in the United States and [fol. 91] "trailer pool offices." What does that mean, will you explain?

A. Yes. In major, heavy producing freight cities, such as Detroit, Michigan, and Cleveland, Ohio, and the other offices listed there, we have a trailer pool where we provide trailers at that pool for four or five or six, or however many are required, so that we have trailers on the spot for shippers in those cities and surrounding areas that wish to use our service. That could be Watson trailers that are in that pool; it could be trailers of other carriers; but it would be trailers that were in our possession or had come into our possession through the interchange service that I spoke of.

Q. Mr. Crosby, is the practice of interchanging trailers unique to Watson, or is it a common practice in the trucking industry?

A. It's a very common practice.

Q. Tell me, sir, how many people are employed in the service of Watson Bros.?

A. Approximately 2,500.

Q. And will you advise us as to the number of trailers which are used in the conduct of service of Watson Bros.?

A. Watson owns approximately 1,650 trailers.

Q. May I ask you this: Directing your attention back [fol. 92] to the Utah and Washington service that you have identified, does that service work in both directions, that is, does the Watson Bros. provide service not only into Utah, but from Utah with other connecting carriers?

A. Yes. Any service that I might speak of is a between-and service. It's not restricted to one direction.

Q. I notice that as part of the brochure advertisement in Exhibit No. 6 that there is a reference to perishable traffic. Do you recall that, or see it in there, sir?

A. Yes. On the very first few pages our perishable division is emphasized, and as it states in the brochure, it's a complete refrigerated and protective service between all points in California and Arizona and the entire midwestern area served by Watson Bros., and it's even more extensive than is shown in the brochure because in the handling of various types of commodities, operating authority is not required for certain types of transportation service that we would perform throughout various states.

Q. Is there any importance attached to the need for providing interchange of trailer service with connecting carriers in the movement of perishable commodities?

A. Yes. There certainly is. In fact, without interchange service on perishable commodities, it would be impossible to operate because of the very inherent nature of the [fol. 93] article you are transporting. For instance, perishable articles where they are being protected from cold or from heat, rather, require very expensive equipment that provides refrigeration, and the article must be kept under refrigeration and kept in the same trailer from origin to destination.

It is not only perishable from the standpoint of heat, but it is perishable from the standpoint of handling the article, so, it must remain in the same equipment from origin to destination.

Q. Are there other kinds of commodities which your company handles which also require for their movement interchange of trailer arrangements with connecting carriers?

A. Yes.

Mr. Husted: I object to this line of questioning, Your Honor. There hasn't been any foundation laid here to sho that the interchange system with which we are all familiar, or the fact that certain cargoes are perishable, are connected in any way with these splash guards. There's been no foundation laid to show that these splash guards in any way speed up or expedite the perishability cargoes.

This has nothing whatever to do with the merits of this case.

Mr. Axelrod: We will connect it, Your Honor.

[fol. 94] Judge Briggle: Not directly, but I think it is a proper background for what the Plaintiffs' contentions are.

Mr. Axelrod: We will connect it, Your Honors.

Judge Briggle: And at least you will undertake to connect it, I suppose, with the questions of operation through Illinois under the Act in question?

Mr. Axelrod: Yes, Your Honor.

Judge Briggle: I think he should be permitted to answer. The objection is overruled.

The Witness: The other types of commodities that require the use of a single trailer from origin to destination would be government traffic, that is, traffic tendered to the carriers by the United States Government on government bills of lading, and perhaps the most critical of those articles would be the transportation of explosives, which are loaded onto carriers' equipment at the origin government installation.

The government agency there affixes a seal to the door of the trailer, a numbered seal, which the carriers dare not break, and that seal must be on that trailer at destination and must be recorded. Therefore, that traffic must move in the same trailer from origin to destination.

There are other types of traffic that are neither perish-[fol. 95] able nor explosives which, because of size or weight or other characteristics, cannot be loaded from one trailer to another and must remain on the trailer from origin to destination.

By Mr. Axelrod:

Q. Does the government also inspect the trailers which are used for the transportation of explosives both at origin and at destination?

A. Yes, sir.

Q. Will you give us an example, sir, of traffic that you have been handling in the movement of explosives, say, from a point in Washington to a point in Illinois to indicate to the Court—and I won't belabor the point—just exactly how this works?

A. Yes, I shall cite one example using a point of Umatilla, Oregon, which originates on a carrier called Black Ball Transportation Company. They move the trailer with its carto (sic) to Seattle, Washington.

Q. Is this an explosives cargo?

A. Yes, explosives cargo in this instance. And then, for example, Garrett Freight Lines would pull that trailer with its cargo to Salt Lake City, Utah, there interchange that trailer with Ringsby Truck Lines who again would interchange that same trailer at Craig, Colorado, with Goldstein Transportation Company, who further would interchange that same trailer with Watson Bros. at Denver, Colorado.

[fol. 96] We would further interchange that trailer at Joliet, near Joliet, Illinois, to Roy's Cartage Company, who would deliver the trailer with its carto (sic) in interchange service to the government installation near Joliet.

Q. Have you prepared as an exhibit a list of carriers with whom you interchange specifically at various interchange points?

A. Yes, sir.

Mr. Axelrod: May I show the Court what has been marked for identification as Exhibit No. 7.

Q. Mr. Crosby, in the case of a Black Ball illustration, whose trailer originates the traffic handled by Watson and others in that instance?

A. The originating carrier, Black Ball.

Q. And approximately how long in distance would that trailer be operated by Black Ball?

A. Oh, approximately a maximum of a couple of hundred miles.

Q. Now, if that trailer were to be operated by Black Ball and others using Watson for final destination into the State of Illinois under the Illinois Contour Mudflap Statute, would that Black Ball trailer have to be equipped with the contour mudflap before it could be legally operated into the State of Illinois?

A. Yes, sir.

[fol. 97] Q. Do you know whether or not the Black Ball Company does or does not have any operating authority directly into the State of Illinois?

A. I do know, and they do not.

Q. Do you know whether or not the trailers of Blac Ball Company are equipped with the contour mudflaps o otherwise?

A. They are not. They are equipped with the conven tional type mudflap that's been described heretofore in thi proceeding.

Q. Now, if you were to want to continue to handle tha kind and type of traffic which originates by Black Ball what would Watson Bros. have to do to provide a lawfu operation within the Contour Mudflap Statute requiremen insofar as Illinois operations are concerned?

Mr. Husted: I object to that question, Your Honor There's been no foundation laid to show here that the Blac Ball Company is immune if its trailer moves into Illinoi from the operation of this Statute.

Judge Briggle: Why, I don't think there is any con tention that they would be immune. What is your question Can you state it again?

Mr. Axelrod: May I withdraw that question for th moment, if the Court please.

Q. I refer you, if you will, please, to Exhibit No. 7 fo [fol. 98] identification. Will you identify and explain tha exhibit, please, sir?

A. Exhibit 7 is a compilation of the motor commo carriers with whom we have interchange of trailer agree ments, specifying the carrier, the certificate of public con venience number and indicating the interchange point with that carrier.

For example, the first carrier is Arkansas-Best Freigh System, Inc., showing their certificate number and the fac that we interchange with that carrier at Kansas City an St. Louis, Missouri.

Q. Now, you interchange traffic with that carrier involv ing the interchange of trailers which cover the movemen in Arkansas on traffic which either originates or is destine into the State of Arkansas?

A. Yes, sir, we do.

Q. Mr. Crosby, are you familiar with a recent order o the Arkansas Public Service Commission having to do wit

the movement of trailers to and from and into the State of Arkansas?

A. Yes, sir, I am.

Q. Will you be good enough to refer to the order of the Arkansas Commission to which I make reference?

A. Yes. It's an order of the Arkansas Commerce Commission. The order is dated December 13, 1957.

[fol. 99] Q. Do you have a copy of that order before you?

A. Yes, sir.

Mr. Axelrod: If the Court please, there will be subsequently introduced a certified copy of order of the Arkansas Commission to which we now make reference, but may the witness refer to it in advance of the introduction of that certified copy?

Judge Briggle: Is there no objection?

Mr. Husted: Yes, there is an objection. That is completely immaterial to the constitutional validity of this act, what the railroad Commission or the Commerce Commission of Arkansas, or any other state may do.

Mr. Axelrod: If Your Honors please, this is one of the very points of our case. We take the position this statute unduly burdens and obstructs, and I quote the word obstructs.

Under the Arkansas Statute, the contour mudflap is an illegal appliance and cannot be used on a vehicle of and operating into or out of Arkansas or over the Arkansas highways. Our very position is that if the Illinois Contour Mudflap Statute is to be given effect, then any equipment which would be equipped with the contour mudflaps for use in Illinois would be illegal if used in Arkansas. That is one of the points of our case, Your Honors, and we submit it is most relevant.

[fol. 100] Judge Briggle: I think I was told at the previous hearing that the Arkansas Commission had outlawed, in a sense, the mudflaps as provided by Illinois, and that they would not be permitted there. That has to do with the question of interstate commerce, of course, and has to do with the position of the Plaintiffs here, I would say, of commerce between Arkansas and Illinois.

Mr. Husted: I submit, if Your Honors please, that under the law that is a national congressional problem. If states

set up conflicting standards in the interest of uniformity, the Congress may well then go in, even though it might be a problem that theretofor they had left to the states, because of the varying conditions over the United States, but if I remember my history correctly, Judge Briggle, that was the very reason that the commerce clause was written into the United States Constitution. It was to settle the petty bickering between the various 13 original states of this country with their border line tariffs; 13 different sets of tariff system. It wouldn't be anything new for the National Congress to go in and, in the interest of uniformity under the commerce clause, erase this, if it is a situation. That is not a judicial problem. That is a legislative problem, and I have a Supreme Court decision directly in point on that very question, if Your Honor please.

[fol. 101] Judge Briggle: Well, unless you are objecting to the fact that the certified copy of the commerce Commission of Arkansas hasn't yet been presented, I think we will receive that evidence subject to your objection, and we will determine later whether it's relevant or not.

Mr. Husted: Thank you, Your Honor.

Mr. Axelrod: May it please the Court, I have asked to have identified for this purpose and in this order another exhibit, Exhibit No. 8, which is a certified copy of an order of the Arkansas Commerce Commission, dated December 13, 1957. I think Mr. Husted has a copy of that. We had it here last time.

Mr. Husted: Yes.

Mr. Axelrod: The witness has a copy of this.

Q. Mr. Crosby, I want to direct your attention to an exhibit marked for identification as Exhibit No. 8. Are you familiar with that?

A. Yes, sir.

Q. Are you familiar with the description of the kind of splash apron or guard which is permissible under Exhibit No. 8 for operations into and through the State of Arkansas?

Mr. Husted: I object to that, Your Honors, on the ground that the conventional so-called apron type flap is not in issue here in any sense; that is (sic) this Court undertakes to

[fol. 102] analyze all the other types of splash guards that engineering ingenuity might devise, this is going to be a mighty long hearing.

The conventional or apron type flap is not provided by law in Illinois. We are concerned only with an Illinois Statute. It has no more relation to the issues of the constitutional validity of contour statute than would a sheathing splash guard entirely enclosing the rear end of a truck or any kind of anti-splash equipment that might be brought to the attention of the Court.

Mr. Axelrod: May it please the Court, it's our position in this proceeding that absent any congressional legislation from the standpoint of uniform legislation it is the purpose of the commerce clause to protect interstate commerce against the inconsistent state requirements, which would have the effect of obstructing commerce between states, and that is the very purpose of the commerce clause, and the commerce clause without any congressional enactment, without any uniformity of legislation on the subject, is there for that very purpose to preclude states from enacting conflicting statutes governing operations in interstate commerce, and the commerce clause knocks those Statutes down on the ground of obstruction.

It is this kind of a situation which is imminent in the conflict between the Illinois Contour Mudflap Statute here [fol. 103] and the Arkansas requirement.

It is our position here that, for example, and I would show by the witness Crosby, Watson Bros. in the ordinary course of its business which does interchange trailers for movement into and through Arkansas, if it had to have the contour mudflap on its vehicles, those vehicles would not be permitted in Arkansas by the terms of the Arkansas Statute.

Judge Briggle: And what is your present question that is objected to?

Mr. Axelrod: I'm sorry, I have lost that, Your Honor.

Q. Are you familiar with the requirements of the State of Arkansas as recently covered by an enactment of the Arkansas Commerce Commission dated December 13, 1957?

A. Yes, sir.

Judge Briggle: Well, that is the Exhibit No. 8 that you have just presented?

Mr. Axelrod: Yes.

Mr. Husted: I don't have a copy of that, Mr. Axelrod. I thought I did, but I do not.

Mr. Axelrod: Take mine.

Q. May I ask you this, Mr. Crosby: How many trailers are used in the operation of Watson Bros.?

A. Well, we have about 1,650 company-owned trailers. [fol. 104] We use more than that from time to time.

Q. Is it possible for you in the ordinary and efficient course of your operation to segregate trailers for use only to and from the State of Illinois?

A. No, sir.

Q. Why is that not possible?

A. Because equipment must be entirely flexible, and it's used throughout our system where we need it.

Q. In order to efficiently operate, and in order to conform with the Statute of Illinois, will you have to equip all of your trailers with contour mudflaps?

A. Yes, we would. The requirements of shipping public change quite drastically from area to area, from time to time. Therefore, that equipment must be shipped from one area to another to take care of those requirements, plus, for efficient operation, the motor carrier must be in position to use that equipment in any area that it's needed in.

For instance, we might start a trailer at Chicago, Illinois. We might haul a load of traffic in that trailer to Denver, Colorado; at that point it might be most efficient operation to use that trailer to haul a load of freight to Atlanta, Georgia. Therefore, the equipment of the carriers criss-cross the continent in the interchange service that I previously described.

[fol. 105] Q. Over any given period of time, how many foreign trailers, or trailers of connecting carriers, are in the service of Watson Bros.?

A. Daily, I would estimate about 300.

Q. Now, when you interchange trailers with carriers, do you swap trailers, so to speak?

A. That is done, but it's not necessary. We swap trailers trailer-for-trailer at an interchange point, or we will tender

a trailer to a connecting carrier on a rental basis, if we are unable to effect an even swap. Or, we will hire a trailer on a rental basis from a connecting carrier in much the same manner.

Q. Now, sir, supposing your equipment fleet was equipped with contour mudflaps, and you swapped trailers with carriers from New York, whose state does not require the contour mudflap. What trailer would then be in possession of Watson Bros. for use in the Watson Bros. fleet under that swap? Would you have a trailer of the foreign carrier that had a contour mudflap on or otherwise?

A. Well, we would have a trailer that does not have a contour mudflap on it, and to use that trailer in the State of Illinois, we would be required to install a contour mudflap, which, by the way, we do not have the permission to do because our Uniform American Trucking Association sponsored interchange agreement between the carriers pro- [fol. 106] hibits us from installing new articles such as contour mudflaps on trailers owned by other carriers, of course, without their express consent.

Mr. Husted: If Your Honors please, I would at this time renew my objection that there's been no foundation laid to show that the owners of these trailers originating in the first place in Utah and Oregon, and in the second place in New York, are immune from the operation of this Statute.

It may very well be true that Watson Bros. as an interchanger have no authority to meddle with the equipment of that trailer, but until such time as it is shown to this Court that the owners of those trailers are immune from the operation of the Statute, why don't they have to put these contour guards on themselves?

Mr. Axelrod: That is the very point of our case, Your Honor, namely, that this Statute not only affects an operation over an Illinois highway, but affects an operation over a New York highway or over a highway in Oregon, because the effect of this statute is to require that the Oregon carrier, Black Ball, equip his equipment with a contour mudflap, or that the New York carrier equip his equipment with a contour mudflap, because, when the trailers of Black Ball Company or the New York carrier are used in inter-

change service with Watson, they cannot be used legally [fol. 107] on the Illinois highway unless they are equipped.

The point of this attack is that the Illinois Statute would require the trailers of the country to be equipped with contour mudflaps before those trailers could be operated lawfully in Illinois. That is the very heart, the very point of our case. Those carriers are not immune from this statute, and we take the position that here is a statute which speaks not over Illinois highways, but attempts to speak over the highways of the country, and that the effect of this statute would be to require every trailer in the United States that would be operated in Illinois to be equipped with the contour mudflap. That is the very point of our case.

Judge Briggle: I think we understand the point. The objection is overruled.

By Mr. Axelrod:

Q. Mr. Crosby, under the terms of the Arkansas order, which was referred to here as Exhibit No. 8, will you tell us whether or not if Watson trailers were equipped with contour mudflaps, would they be lawful from the standpoint of operating into Arkansas on the basis of a trailer interchange?

Mr. Husted: I object to that question, Your Honor. The construction of a rule or statute is not the province of an expert witness.

[fol. 108] Judge Briggle: Objection is sustained. The Court can conclude from the exhibit here, I presume, that it would not be legal in Arkansas.

Mr. Axelrod: That is our position, Your Honor. My purpose was simply to express for the record some evidence which would assist the Court in determining whether or not the Arkansas requirement is or is not a contour requirement, a contour splash requirement, and that does take, Your Honor, some further amplification. Perhaps the orders may be self explanatory, but we are talking about some mechanical device here.

Judge Briggle: It says a splash apron of flexible material directed from the rear of the rear-most wheels hang-

ing perpendicular. It seems to define the one that is shown by these previous exhibits here.

Mr. Axelrod: It defines the one shown by the P.I.E. exhibit, which I think is Exhibit No. 3, and it is our position that the Arkansas Statute would outlaw the contour mudflap as shown by Exhibits 1 and 2.

Judge Briggle: Well, the objection to that question is sustained.

By Mr. Axelrod:

Q. I direct your attention back to Exhibit No. 7. Do I understand that you do now handle Arkansas traffic with connecting carriers where the trailers are interchanged for movement into Arkansas?

[fol. 109] A. Yes, sir, we do.

Q. And do you, for example, give to any Arkansas carriers your trailers for movement over the Arkansas highway under the operation of a connecting carrier who has authority to operate in Arkansas?

A. Yes. There are 10 or 15 such carriers that we do business with, and we would interchange about 100 trailers per week with those carriers.

Q. Would you be good enough from Exhibit No. 7 to quickly identify some of those carriers with whom you do that interchange?

Mr. Husted: Oh, I object to this line of questioning, Your Honor. We are concerned with the Illinois Statute, not the Arkansas regulation.

Judge Briggle: I don't think those details are important. Objection will be sustained.

Mr. Axelrod: All right. Thank you.

Q. Mr. Crosby, in 1956, what was the total number of miles which Watson Bros. operated system-wise?

A. Approximately 58 million.

Q. Can you tell me the number of miles which it operated over Illinois highways in the same period of time?

A. About 4 million, yes, 4 million miles.

Q. Can you tell me, sir, what was the gross revenue [fol. 110] derived by Watson Bros. in connection with its operation for the year 1956?

A. Approximately $30 million.

Q. Can you tell me what percentage of the gross revenue was derived from the type of traffic which moves in the interchange trailer service?

A. About 60 to 65 per cent.

Q. Can you tell me, sir, what do you estimate the cost to be of equipping all of your trailers with a contour mudflap?

A. We estimate the cost to be approximately $30 per trailer, which is about $45,000.

Q. Would the figures for 1957 for Watson Bros., as you have just indicated, be substantially the same as for 1956?

A. Yes, sir, substantially.

Q. At the present time, with what kind of an appliance are the vehicles of Watson Bros. equipped?

A. They are equipped with what has been described as a conventional type of mudflap, which, as far as we are concerned, is uniform about the country.

Q. And have they so been equipped for a great many years?

A. Yes, sir.

Q. Mr. Crosby, are you familiar with the accident record [fol. 111] of Watson Bros.?

A. Yes, sir.

Q. Have you checked the accident record of Watson Bros. for determining for the purpose of whether or not any splash or spray have been the cause of any accidents had by Watson Bros. in the year 1957 or '56?

A. Yes, sir.

Q. And what is the answer to that question?

A. I found none.

Judge Briggle: Is the type of guard you are using the same as displayed in Plaintiffs' Exhibit 3?

The Witness: Yes, sir.

By Mr. Axelrod:

Q. Mr. Crosby, if Watson Bros. was required to equip its trailers with the contour mudflaps of Illinois, what affect (sic) would it have upon your ability to continue to operate, particularly in connection with the handling of interchange traffic moving in interchanged trailer service?

A. It would hamper our ability tremendously; it would be a very severe blow to our company.

Mr. Husted: I object to these conclusions.

Judge Briggle: Well, of course, those are conclusions, and they are objectionable, but let him tell what he knows about it.

By Mr. Axelrod:

Q. Why?

[fol. 112] A. Well, the facts are these: Not only is there the expense and the difficulty of attaching the contour mudflap to our equipment in lieu of those that the equipment is presently equipped with, and that certainly is an expenditure of $45,000, approximately 10 per cent of our net income for 1956, but that expense alone would not be to the extent that it would put us out of business. But that is not the whole story by any means of the affect (sic) of being required to attach these mudflaps to the equipment that we use in interstate commerce.

Going on, if we were required to attach these mudflaps to the equipment that we use in interstate commerce, which is our own equipment plus the equipment that we receive in interchange service, in interstate commerce, it would in some cases have the effect of precluding us from equipping the connecting carriers with these mudflaps, and it would restrain the movement of equipment interchange service to the extent that the shippers about the country would not use our services because they would know that we would be forced to physically transfer the freight.

They would use other forms of transportation such as the railroads that have no contour mudflap requirement, and therefore they could move their freight from any origin to any destination in a railroad freight car in interchange service.

[fol. 113] Mr. Husted: I object to all of this testimony except the language pertaining to expense as being mere conjecture and conclusionary language.

Judge Briggle: I think the answer will be allowed to stand.

By Mr. Axelrod:

Q. Would the service resulting be disrupted substantially if you were required to install the contour flaps?

A. Yes.

Mr. Husted: That calls for a conclusion. There is absolutely no evidentiary fact to warrant that kind of a conclusion shown here, Your Honors.

Judge Briggle: Let him answer.

The Witness: Any time you stop a trailer to do anything to it, it disrupts the service. Motor carriers exist on a fast, efficient transportation service, and, if we were required to stop a trailer, assuming we had permission to install the mudflap on a foreign trailer, that is, a connecting line trailer, if we were required to stop that trailer at some shop or at some state line or some garage to install a contour mudflap, there is bound to be delay which restricts the kind and type of motor carrier service that we have been providing for years.

By Mr. Axelrod:

Q. If you are handling explosives traffic, could you put a [fol. 114] contour mudflap on a trailer of a foreign carrier?

A. If there was any welding or any hammering or anything that might be prone to develop sparks, we could not because fire is one of those things that is most dangerous in the handling of explosives traffic, and in our company about 10 per cent of our entire volume is that kind of traffic, and we can't do anything to those trailers in transit that might cause a spark or cause fire, which would in turn cause an explosion.

Mr. Husted: I object to that answer, Your Honor, on the ground that there is nothing in the Statute that requires them to do anything in transit.

Judge Briggle: Let the answer stand. Objection is overruled.

Mr. Axelrod: May I tender the witness for cross examination, if Your Honors please, and may I offer in evidence the exhibits which have been identified through this witness, which are Exhibits 1 to 8.

Judge Briggle: 1 to 8.

Judge Major: Might I ask a question. How much effort would be required to make transfer, what you call a conventional type of mud splash guard to the type required by the Illinois Statute?

The Witness: That would vary on the type of equipment that the contour flap was being installed on. In fact, on [fol. 115] certain types of our equipment, which we call sliding tandems, we in our engineering department haven't found a really satisfactory way of installing it.

So, I would judge a minimum of two or three hours, possibly four, of labor alone.

Mr. Axelrod: We have subsequent testimony, Your Honor, on that point.

Judge Major: Very well.

Judge Briggle: Is there any objection to these exhibits, Mr. Husted?

Mr. Husted: There is no objection, if Your Honors please, to Exhibits 1 and 2 depicting the contour splash guard. In fact, we would like to use them ourselves to some degree.

We do have an objection to No. 3 on the ground that that type of splash guard is not required by law in Illinois, is not in issue here in any sense any more than any other type of splash guard that might be devised by engineering skill.

We have no objection to Exhibit 4, if it's merely for background purposes, which I understand that it was. The same of Exhibits 5 and 6, if it's merely to show the background and operation of these Plaintiffs, or of this particular Plaintiff.

[fol. 116] The same of Exhibit 7, if it's simply for background.

We have a specific objection to Exhibit 8, which is a copy of the regulatory order of the Commerce Commission of Arkansas on the ground that we are concerned with the laws of Illinois, not with the laws or the rules of Arkansas; secondly, there is no showing as to why the Arkansas regulation should be entitled to any more credence than the Illinois Statute if they are conflicting in their specifications.

Judge Briggle: All right. Exhibits 1, 2, 3, 5, 6 and 7 will be received in evidence. Exhibits 3 and 8 will be received subject to the objection.

(Whereupon, Plaintiffs' Exhibits Nos. 1, 2, 3, 5, 6 and 7 were received in evidence, and Nos. 3 and 8 were received in evidence subject to objection.)

Judge Briggle: You may cross examine.

Cross examination.

By Mr. Husted:

Q. In your operations over the various states of the United States, is it the policy of Watson Bros. to observe the size and weight regulations?

A. Yes, sir.

[fol. 117] Q. And they do vary considerably from state to state, do they not?

A. Not a great deal.

Q. They do vary somewhat, do they not?

A. They vary some from state to state, but none of the weight or speed restrictions or anything of that sort interfere with the movement of trailers up and down the highway. It doesn't interfere with the movement of trailers from point to point.

Mr. Husted: I disclaim that. That is not responsive. I simply asked if they can comply.

Mr. Axelrod: I think the witness is entitled to finish his answer.

Judge Briggle: He has answered that they do vary to some extent. That is an answer. Proceed.

By Mr. Husted:

Q. And is it not true that certain states of the United States have, including Illinois, turn signal requirements for motor trucks?

A. That may be true. We have turn signals on our equipment.

Q. And you do comply with that requirement?

A. Yes. We'd have them on there if there wasn't a requirement, in our company.

Q. Very well. Do you know of any reason why the owners of these trailers not owned by Watson Bros. that are inter-

[fol. 118] changed to Watson Bros. tractors, do you know of any reason why they would not be subject to the Illinois law the same as Watson Bros.?

A. No. I think they very much are subject to the Illinois law.

Q. I see.

A. And that is one of the difficulties, as we see it.

Q. According to your agreement that you have referred to on direct examination, Mr. Crosby, actually speaking, you have no authority to interfere with any of the equipment on the interchanged trailers owned by other persons or other corporations, do you?

A. Well, I don't know exactly what you mean by "interfere."

Q. Well, was that not the term you used, "interfere"?

A. No. I think the term I used was to install or change or repair.

Q. All right.

A. Anything on the equipment.

Q. To install or exchange or repair. Do you have authority to do that?

A. Up to a certain agreed figure with the carrier, we would have, and that would be minimum repairs, and we have no authority, for instance, to take off their mudflaps [fol. 119] and install a different type and kind of mudflap.

Q. Under what theory do you——.

Have you indicated to this Court that it would be your responsibility to do that?

A. We have the equipment in our possession when we reach the state line, the state line of Illinois. When we operate into the State of Illinois, we are responsible with complying with the act, so, we either must have the contour mudflap on that piece of equipment, or we must keep that equipment out of the State of Illinois. Therefore, we would have to take the cargo off the trailer and put it on a piece of equipment that was equipped with the contour mudflap.

Q. Do you have any basis for your conclusion that the owners of those trailers would undertake in no way to comply with the law?

A. Well, yes, I do, and may I explain that in this way: The owners of those equipment, for instance, the Black Ball Transportation Company in Washington, operates almost exclusively in the State of Washington. He has flaps on his trailers that comply with the Washington Statute. He has flaps on his trailers that for years he has been able to use in interstate commerce in an interchange service. Therefore, as far as that carrier is concerned, the owner of that equipment is concerned, he has the type [fol. 120] of flap that has been universally used throughout the nation for a period of years, and so far as he is concerned that serves his purpose.

Q. Well, you haven't answered my question yet, Mr. Crosby, despite your speech.

Mr. Axelrod: I think the question was why couldn't he equip his equipment with the contour mudflaps, despite the fact he is operating in the State of Washington.

The Witness: Well, he could equip them with the contour mudflap.

Mr. Husted: That is all. That is the question and answer.

Mr. Axelrod: Let him finish, please, sir.

The Witness: But of the equipment that he has, maybe only a small percentage of it would be used in the interchange service throughout the nation, a small percentage as far as he is concerned, but we, as the major carriers, using a small percentage of all of the small carriers about the country, then, we have a major percentage of trailers that gives us a problem when we reach the State of Illinois.

By Mr. Husted:

Q. Now, you have stated as to why you could not comply that it was because of the expense, and you conceded on direct testimony that that would not put you out of business. Is that not correct?

A. That's correct.

[fol. 121] Q. And you further testified that you could equip these trailers for a figure of approximately $30 per trailer?

A. Yes, sir.

Q. What is the cost of the average trailer that would require a $30 pair of fender splash guards?

A. The cost of those trailers would run from $8,000 to $12,000, I imagine, now.

Mr. Husted: That is all, Mr. Crosby.

Judge Briggle: Is that all of this witness? Any questions, Mr. Stephenson?

Mr. Stephenson: No, sir.

Mr. Axelrod: I have none on redirect, Your Honors.

Judge Briggle: All right. You may call your next witness.

(Witness excused.)

Mr. Axelrod: May I call Mr. Gaughen, please.

CLARENCE GAUGHEN called as a witness by and in behalf of the Plaintiffs herein, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Axelrod:

Q. Will you kindly state your name and your address?

[fol. 122] A. Clarence Gaughen, Oak Lawn, Illinois.

Q. Mr. Gaughen, what is your business?

A. Superintendent of maintenance with Consolidated Freight Ways of Chicago.

Q. And what is the Consolidated Freight Ways, please, sir?

A. Large common carrier, motor carrier operating in interstate commerce.

Q. And can you tell me what your duties consist of, please?

A. Maintaining all the equipment in what we call our Eastern Region, which is everything east of Montana and Wyoming.

Q. Now, Consolidated Freight Ways is not a party to this proceeding, is that correct?

A. That's correct.

Q. Can you tell me, sir, how many people you have under your immediate jurisdiction and supervision?

A. About 100.

Q. As part of your duties, Mr. Gaughen, are you charged with the responsibility of equipment, the various attachments and pertinences (sic) which are part of the operating fleet?

A. Yes.

Q. How long have you been connected with Consolidated?

[fol. 123] A. Almost 18 years.

Q. Has your work with Consolidated been exclusively in connection with equipment, maintenance, attachments and appurtenances?

A. For the past 15, it has, yes, sir.

Q. Mr. Gaughen, are you a member of any engineering society?

A. Yes.

Q. And what is the name of that society?

A. Society of Automotive Engineers, known as the SAE.

Q. Mr. Gaughen, has the Consolidated Freight Ways equipped a part of its fleet with the contour mudflaps as required by the Illinois Statute?

A. Yes.

Q. Approximately how many sets of contour mudflaps have you installed on your equipment?

A. About 350, between 325 and 350.

Q. Approximately how many pieces of equipment are you actually in fact operating?

A. About 560, I think we have trailers, now.

Q. When did you first begin putting the contour mudflaps on your equipment, sir?

A. Put a few on in 1955; put some more on in '56 and again in '57.

[fol. 124] Q. Did you place these on for the purpose of complying with the Illinois law?

A. Yes.

Q. Can you tell me, sir, what was the cost of the installation of the contour mudflaps on your equipment?

A. They averaged about $35 a unit.

Q. Have you, since placing the contour mudflaps on your

equipment, had any experience in connection with the continued maintenance of contour mudflaps?

A. Yes.

Q. Can you tell me whether or not you have added substantial cost for the purpose of maintaining the contour mudflaps on your equipment?

Mr. Husted: I object to that as calling for a conclusion.

Judge Briggle: I think he may answer.

The Witness: The cost has been excessive maintenance on them.

By Mr. Axelrod:

Q. Will you explain why you have had excessive maintenance cost in connection with the use of the contour mudflaps?

A. Well, most of our trailers are equipped with what is known as a sliding tandem. You cannot fasten the flap rigid to the body.

Q. Will you explain that, please, a little further to the [fol. 125] Court?

A. Well, it must be fastened to the sliding area or subframe as we call it so it slides back and forth with the wheel. They travel a distance of 60 to 70 inches.

Q. Would you be good enough to take the Exhibits 1 and 2, which have been distributed to the Court, and would you be good enough with reference thereto to point out, please, sir, just exactly what you are talking about at this moment? May I ask you, do Exhibits 1 and 2 show a sliding tandem trailer?

A. Yes.

Q. All right. Now, you have indicated the difficulty with respect to the sliding tandem. Would you be good enough, by reference to the pictures, Exhibits 1 and 2, to re-explain your answer?

A. Well, in order to fasten the sliding tandems, you have roughly 24 inches metal and flap sticking straight out and no way to support the outer edge of it. Therefore, it creates a lot of vibration, and eventually the vibration just breaks them off at the point of contact with the sub-frame construction.

Judge Briggle: Now, is this piece through here, referring to the Exhibit 1, that is the frame of the trailer?

The Witness: That is the frame that holds the flap. [fol. 126] This is welded to the sub-frame; this sticks out toward the outer edge of the trailer roughly 24 to 25 inches, and there is no support whatever from this point right here.

Judge Briggle: You mean no support for this piece here?

The Witness: Right, or the flap either.

Judge Briggle: Well, that piece is not a part of the flap, is it?

The Witness: No. That is what you have to fasten the flap onto to hold it.

Judge Briggle: That is not a normal piece of the trailer then?

The Witness: No, not unless you are putting on contour flaps, it is not.

Judge Briggle: That is something——

The Witness: Added.

Judge Briggle: The trailer adds to hold the mudflap, is that right?

The Witness: That's right.

By Mr. Axelrod:

Q. Mr. Gaughen, please, instead of referring to "this," would you be good enough to describe what "this" means or refers to, because "this" in the record is going to be a little hard to follow.

A. You must put a bar or tube or pipe welded to the [fol. 127] sliding portion of your trailer to fasten the mudflap to so that it will slide with the wheels. There is no support on the outer 24 or 25 inches. You cannot support it to the body because it must slide back and forth. The body remains stationary.

Judge Major: What is it that will slide back and forth?

The Witness: Your tandem assembly, your wheel and axle assembly. See, these holes here are sliding your tandem assembly forward and back. That is to adjust wheel bases, adjust loading axle weights.

Mr. Axelrod: We have some other exhibits. We have some things that are a little hard to visualize. It's prob-

ably a better way to bring the matter graphically to the Court.

Judge Major: Don't you have a truck for an exhibit?

Mr. Axelrod: Your Honor, I'm sorry. I don't think we could make it in the Courtroom. Except only this, that since we have been with this Statute, why, I think there isn't a time we don't drive on the highway, at least we were involved in the case here, just keep looking for either contour or straight mudflaps. I venture to say that when Your Honors drive back, you will probably be looking for the same thing.

Q. Mr. Gaughen, I direct your attention to an exhibit [fol. 128] marked for identification as Exhibit No. 9. Was that a photograph which you personally took?

A. Yes, it is.

Q. Can you tell us what Exhibit No. 9 described? You referred to a bar. Will you identify Exhibit No. 9?

A. It shows both ends of that bar. This bar here, the flaps were attached to it. Both ends of those were broken off by vibration on the highway. The trailer came in with no flaps on it whatever.

Judge Briggle: I'm not clear on that. Is that this bar here?

The Witness: Yes. Turn the picture over, Your Honor.

Judge Briggle: All right. That shows you how dumb I am. I am operating this truck upside down.

The Witness: That bar is welded on there to carry the contour flaps, and the vibration broke it off at both ends. There is no way to support the outer end of it.

By Mr. Axelrod:

Q. Mr. Gaughen, I want to refer you to Exhibit No. 10. Will you be good enough to explain to the Court what Exhibit No. 10 shows, and did you take that photograph also, Exhibit 10?

A. Yes, I did. This shows one——

Judge Major: Why don't you hold it up so the other Judges can see it.

[fol. 129] The Witness: This one shows that flap that has been broken off on the highway and why, I don't know, but

somewhere, someone picked it up and welded it back on. This is a bad crack here and ready to be broken off again. It came into our shop in Chicago. As you can see, there's a lot of extra welding in there.

By Mr. Axelrod:

Q. Are Exhibits 9 and 10 taken of trucks which are in use and were in use by Consolidated Freight Ways?

A. Yes.

Q. Now, you have indicated that one of your big problems in connection with use of the contour mudflaps is maintenance, is that correct?

A. That is correct.

Q. For any given period of time, do you have specific figures concerning the amount that you have expended as a result of your attempts to maintain the contour mudflaps on your trailers?

A. Yes, I do.

Q. Will you explain, please?

A. I checked my job tickets from November 1 through December 11.

Q. Of what year?

A. Of 1957.

Q. Thank you, sir.

[fol. 130] A. And of 150 trailers that came through the shop during those 41 days, 50 trailers had to have flaps replaced, either one or both of contour flaps.

Q. How many man hours were required in connection with that operation?

A. I believe it was 186 man hours. I have the job ticket in my brief case.

Q. And what was your cost of labor per hour?

A. $4 per hour.

Q. That totalled what in dollars and cents from the standpoint of maintenance cost to Consolidated Freight Ways?

A. Well, roughly $720 to $'40 or $'50.

Q. Now, does that include the cost of buying new contour mudflaps, or simply the continued maintenance cost in connection with their use?

A. Labor only. That does not include the cost of the flap.

Q. Can you tell me, sir, prior to the Consolidated Freight Ways installing the contour mudflaps, what kind of mudflaps were on the equipment of Consolidated?

A. What has been described here as the conventional or straight rubber flap.

Q. I show you the Exhibits 3 and 4 which were th P.I.E. pictures. Are you referring now to the kind of a mud-
[fol. 131] flap which is depicted in the P.I.E. trailer?

A. I haven't seen that.

Mr. Husted: I would like to renew my objection that the Court is not concerned with the old style conventional flap at all. We are concerned with the contour flap.

Judge Briggle: He may answer. Objection overruled.

The Witness: Yes. That is the type of flap that we have used for a good number of years.

By Mr. Axelrod:

Q. Is this the type of flap which is on all the other equipment except that specifically covered by the contour mudflap?

A. That is right.

Q. What has been your experience in connection with the longevity of the straight conventional mudflap in contrast to the contour mudflaps?

A. Well, they never kept any record on the rubber flaps because they didn't create any problems.

Q. Mr. Gaughen, based upon your experience, do you have any opinion as to what causes the contour mudflaps to become detached from the trailers?

A. Yes, I do.

Q. What is your opinion?

A. Weight, vibration, and the fact that you can't anchor them solidly to the body.

Q. Will you explain that, please, sir?

[fol. 132] A. Well, as I said before, you can't fasten them to the body solidly due to the sliding tandem, and there is no way to anchor them other than at the centers.

Q. Mr. Gaughen, have you found any other problems in connection with your use of contour mudflaps because

of the rigid nature or character of the contour mudflap in contrast to the flexibility of the straight mudflap?

A. Quite a number of them get bent up and have to be thrown away or hammered out or straightened out.

Q. Why would they get bent up?

A. Backing into various docks or curbs.

Q. Well, how would the contour mudflap be dented or broken in backing into a dock? What is a dock? Will you explain that to the Court?

A. Platforms for loading freight.

Q. And how high are the docks?

A. Roughly 50 inches, 52 inches.

Q. Does it mean that the truck, the back of the truck is backed up to the dock for the purpose of loading?

A. That is right.

Q. And also for the purpose of unloading?

A. Right.

Q. Mr. Gaughen, can you tell me this: Have you had any blow outs occur in connection with trailers equipped with contour mudflaps?

[fol. 133] A. Yes.

Mr. Husted: I object to that. Of course they have blow outs.

Mr. Axelrod: This is preliminary, Your Honor.

Judge Briggle: I assume that it is. You are not blaming the mud guards?

Mr. Axelrod: No, sir.

Judge Briggle: Let him answer.

The Witness: Yes, we have.

By Mr. Axelrod:

Q. What, if anything, has happened to the contour mudflap affixed to the trailer where the tire blew out?

A. Well, I know of about three cases personally where the tire caught the contour flap and tore it completely off the trailer.

Q. And when it tears it completely off the trailer, what happens to the contour mudflap, and where does it rest or light?

A. It lands on the highway.

Q. Now, in your opinion, a contour mudflap on the highway, would that be an obstacle of danger to oncoming traffic?

A. It most certainly would.

Q. In connection with blow outs, prior to the use of the contour mudflap, can you tell me whether or not there were [fol. 134] any such obstacles created as a result of such tire blow outs where you used the conventional mudflaps?

A. Not to my knowledge. The conventional flap is flexible, and it will move away from the tire and swing back into position again.

Q. In your opinion, would a contour mudflap, lying on the highway, present a dangerous condition?

A. Yes, it would.

Mr. Axelrod: That is all I have of this witness.

If the Court please, I would like to offer in evidence the Exhibits Nos. 9 and 10 which have been identified by this witness. He indicated he had taken the photographs himself, Your Honors.

Judge Briggle: All right. They may be received

(Whereupon, Plaintiffs' Exhibits Nos. 9 and 10 were received in evidence.)

Judge Briggle: Any questions, Mr. Husted?

Mr. Husted: Yes, I have some questions of this witness. You mean about the exhibits?

Judge Briggle: Well, if you do have, yes. I didn't ask you, but do you have any objection?

Mr. Husted: There was no proof, if Your Honor please, that these guards were ever properly installed. The proof consisted of the fact that they were missing, but no basic [fol. 135] proof.

Judge Briggle: They were exhibits tending to show installation on his trucks.

Mr. Husted: For that purpose, we have no objection.

Judge Briggle: All right. Now, do you want to ask him any question?

Mr. Husted: Yes, I do.

Judge Briggle: You may proceed.

Cross examination.

By Mr. Husted:

Q. Do you contend, Mr. Gaughen, that a tire in blowing explodes with such force as to blow these contour guards off the trailers?

A. It does when the rubber comes loose and catches them.

Q. When what?

A. It blows the rubber on the tire loose. It will catch the metal guard. They must be mounted within four or five inches of the tire.

Q. It's a piece of rubber that blows out of the tire?

A. When the tires blow, yes, sir.

Q. That knocks these off, is that correct?

A. That's correct.

[fol. 136] Q. According to your contention?

A. That's right.

Q. How big a piece of rubber blows out of a tire?

A. It all depends. It will blow it loose; one end of it will catch the contour flap.

Q. Well, now, a tire, when it blows, deflates, does it not?

A. Right.

Q. And when it deflates, it moves farther away from the contour guard, does it not?

A. When it blows, it explodes, it blows out, does it not?

Q. Well, perhaps I don't understand you now, Mr. Gaughen.

A. A blow out is just what it is, a blow out. It blows out. Naturally, it deflates afterwards.

Q. Now, is it your contention that the escape of air or the pieces of the tire knocked it?

A. The pieces of tire.

Q. That is completely separated from the balance of the tire, is that correct?

A. Not necessarily, no.

Q. Well, how does it get from the position that it was, 5 inches from the guard to the tire, with such force as to——

[fol. 137] A: (Interposing) When it blows the hole in the tire, naturally, something has to come loose to blow a hole in the tire. Those particles will catch on the flap and

not every time, I didn't say that, but occasionally they do. Three cases personally I have seen where they tore the flap completely off the trailer.

Q. Would you say that is the fault of the guard, or would you say that is the fault of the tire when it blows?

A. The tire blows out, that is true.

Q. And secondly, is it not true that most of the trailers engaged in interstate commerce have dual tires?

A. That is right.

Q. And unless they both blow at the same time, there is no immediate change in the elevation of the truck, is there?

A. That is right.

Q. That is, the remaining dual tires carry the truck on so that there is really no great bounce?

A. That's right.

Q. You wouldn't contend that a fender laying on the highway that had been broken off or had fallen off a truck or a vehicle of the first class, even, a passenger car, you wouldn't contend that that wouldn't create a hazard on the highway, would you?

[fol. 138] Mr. Axelrod: I am objecting to that, if Your Honors please. We are not comparing like with like at this point.

Judge Briggle: I think we will take judicial knowledge that it would create a hazard regardless of what car it came from.

By Mr. Husted:

Q. And would not that same thing be true of a bumper or a muffler or a rear tire or anything else that is suspended or attached in any way to the body of the truck?

A. Depending on the size of it, yes.

Q. Depending on the size of it, yes. Well, those items that I mentioned are in the main much bulkier and have much more stability than does a contour guard meeting the requirement of the Illinois Statute, does it not? A bumper, for instance?

A. They can properly be installed where a contour flap cannot be installed.

Q. You are not answering my question. I asked you if

they are not of greater bulk or greater stability than a contour splash guard?

A. Yes, sir, that's right.

Q. Do you know any accident that has resulted from a contour splash guard being dropped or falling on the highway?

A. No, I do not.

[fol. 139] Mr. Husted: I think that is all. Just a moment, please.

Q. In your opinion, would a rubber or plastic or other flexible material contour flap be a hazard on trucks?

A. They wouldn't be as much a hazard as the metal.

Q. Wouldn't be as much as the metal.

Redirect examination.

By Mr. Axelrod:

Q. Mr. Gaughen, just one question, if I may. In connection with the blow out that you referred to, you indicated that it was in part the fault of the tire, is that correct?

A. That's right.

Q. Was it also in part the fact that you had the rigidity of the contour mudflap?

A. We——

Mr. Husted: I object to the leading nature of that.

Judge Briggle: Well, I think that is too speculative. Objection is sustained.

Mr. Axelrod: I withdraw the question.

Q. If you had on that same vehicle the conventional straight mudflap, would there have been the same blowing off as a result of the tire?

[fol. 140] Mr. Husted: I object to that. His witness has already answered that, as far as that is concerned, and it's immaterial. We are not concerned with the old style flap. They are not required by law.

Judge Briggle: Do you mean to ask would the result be the same, or what caused the tire to blow out?

Mr. Axelrod: Would the result be the same, Your Honor.

Judge Briggle: He may answer.

The Witness: No, the result wouldn't be the same because the other type flap is flexible. It would move back and swing back into position again.

Mr. Axelrod: That is all, Mr. Gaughen.

Mr. Husted: I have one question.

Recross examination.

By Mr. Husted:

Q. Do you have any way of describing in any unit of measurement of force that of an exploding or a broken tire?

A. No, I do not.

Q. You have no idea whatsoever?

A. No.

Mr. Husted: That is all.

[fol. 141] Judge Briggle: Call your next.

Mr. Axelrod: If the Court please, Mr. Steiner will interrogate the next two witnesses.

Mr. Steiner: Mr. Hayes.

George Hayes called as a witness by and in behalf of the Plaintiffs herein, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Steiner:

Q. Will you state your name, please?

A. George Hayes.

Q. Where do you reside?

A. Chicago, Illinois.

Q. And what is your business or occupation?

A. I am a truck driver for Cooper-Jarrett.

Q. And how long have you been employed by Cooper-Jarrett?

A. One year.

Q. And is Cooper-Jarrett a common motor carrier operating over highways in interstate commerce?

A. Yes, sir.

Q. Prior to becoming employed as a driver for Cooper-Jarrett, how much experience have you had in driving [fol. 142] trucks over the highway?

A. Twelve years.

Q. And at the present time, are you engaged in driving a tractor-trailer unit over the highway?

A. Yes, sir.

Q. And do you have a particular scheduled route or assignment?

A. Yes, I do.

Q. And will you tell us what your particular assignment is?

A. I drive a Rita for Cooper-Jarrett.

Q. And from where to where?

A. From Chicago to LaGrange, Indiana.

Q. Now, calling your attention to the 17th day of December, 1957, were you engaged in your duties as a driver for Cooper-Jarrett?

A. Yes, sir.

Q. And on that day, did you leave Chicago with a load of freight destined to LaGrange, Indiana?

A. Yes, sir.

Q. About what time of the day or night did you leave Chicago?

A. 8:30 in the evening, sir.

Q. And when you left Chicago, what kind of a trailer did you have attached to your tractor?

[fol. 143] A. I had a 32 tandem-door semi.

Q. And did you have any freight in that trailer?

A. Yes, sir.

Q. What did you have in that trailer?

A. Swinging beef.

Q. And what was the weight of the cargo in your trailer?

A. Approximately 30,000 pounds.

Q. Now, prior to leaving Chicago, did you inspect your equipment, and particularly the trailer equipment, to see if everything was in good physical and mechanical condition?

A. Yes, sir.

Q. Did you check the condition of your tires, among other things?

A. Yes, sir.

Q. What was their condition?

A. They were in good shape.

Q. What was the condition of weather when you left Chicago?

A. It was misty, windy, kind of foggy.

Q. Now, can you tell us the route that you took from your terminal? Where is that located?

A. 74th and Damon.

Q. In Chicago?

[fol. 144] A. Yes, sir.

Q. What route did you take as you started to proceed to LaGrange, Indiana?

A. I take 74th Street to Ashland Avenue, right on Ashland to 87th Street, 87th to Stoney Island, Stoney Island to 95th, and 95th into the Indiana Turnpike.

Q. Now, on (sic) route to LaGrange, did anything unusual happen in the operation of this vehicle?

A. Yes, sir.

Q. Where did this unusual event take place?

A. Approximately the 84th milepost on the Indiana Turnpike.

Q. And what, if anything, occurred at that time and place?

A. I noticed a tremendous tug at the back end.

Q. Of your trailer?

A. Yes, sir.

Q. And at the time that you were noticing or feeling this tug, did you have occasion to observe how fast you were driving?

A. Approximately 40 miles per hour.

Q. And what, if anything, did you do when you felt this tug at the trailer?

A. I pulled immediately to the shoulder.

Q. And did you stop your unit?

[fol. 145] A. Yes, sir.

Q. When you stopped your unit, what next did you do?

A. I went around to the rear of the trailer, and I noticed my right rear tires were smoldering.

Q. When you noticed the smoke coming from your rear tires, what did you do?

A. I went back to my tractor, got my fire extinguisher and started extinguishing the fire.

Q. Did you at that time also have occasion to observe the condition of the right rear tires of your trailer?

A. Yes.

Q. What were their condition?

A. They were both blown.

Judge Briggle: Both what?

The Witness: Blown.

By Mr. Steiner:

Q. They had blown out?

A. Yes.

Q. Both of them?

A. Yes.

Q. At the time that this trailer left Chicago, was it equipped with the contour mudflap as depicted in Exhibits 1 and 2 here?

A. Yes, sir.

Q. And how were they attached to the trailer?

[fol. 146] A. Welded to the frame.

Q. Now, after the accident, did you have occasion to see those contour mudflaps?

A. Yes, I did.

Q. Where were they?

A. They were approximately four feet in front of the right rear wheel.

Q. Had they become completely disengaged from the trailer itself?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

Q. Were the tires on the right rear wheels new tires?

A. No, they were recaps.

Q. Now, based upon your years of experience in driving on the highway, do you have an opinion as to what caused these contour mudflaps to become disengaged from the trailer?

A. Yes.

Mr. Husted: I object to that that his experience driving a truck wouldn't give him any right to form that kind of an opinion. It would be mere conjecture.

Judge Briggle: I think he might answer subject to the objection.

By Mr. Steiner:

Q. Do you have an opinion, sir?

A. Yes, I do.

[fol. 147] Q. What is your opinion?

A. It threw a recap, and it caught on the contour mudflap and tore it completely off.

Q. What do you mean by "threw a recap"? Will you explain that in detail as to what happened?

A. The cap came loose from the tire and rolled through back into the flap.

Q. Into the mudflap?

A. Into the contour flap.

Q. And then it's your opinion, as I understand it, that the force of that——.

A. (Interposing) The impact forced it off.

Q. Now, did it force off the contour mudflap only on the right side of the trailer, or did both the left and the right contour flaps come off?

A. Tore it completely, both of them.

Q. Now, in the course of your experience, approximately how many miles do you drive on the highway every year?

A. Approximately a hundred thousand.

Q. And I take it that during the past 12 years, in driving, that you have experienced blow outs while driving?

A. I have.

Q. During all the years that you have driven, and when you have had a blow out, have you ever experienced a blow [fol. 148] out which caused the mudflap to become disengaged from your trailer prior to December 17, 1957?

A. Never.

Q. During all of your years of experience, have you been driving with the so-called conventional mudflaps, or the contour mudflaps?

A. Conventional.

Q. During all of this experience, have you ever had an occasion of a blow out and the tires caught on fire at the same time?

A. No, sir, I never did.

Q. Based upon your years of driving and the number of miles that you have driven over the highway as a truck driver, do you have an opinion as to whether or not there is an advantage or disadvantage from a safety standpoint in the use of a contour mudflap as compared to the conventional mudflap?

A. Yes, I do.

Q. And what is your opinion, sir?

Mr. Husted: I object to that. That calls for a conclusion on the question of ultimate fact. That is for this Court to determine whether or not this is a proper safety feature.

Mr. Steiner: If the Court please, here is a man that for 12 years every night drives a truck on the highway, [fol. 149] and a man whose life is endangered, as a matter of fact.

Judge Briggle: There may be some doubt as to whether he is sufficiently qualified to express an opinion as to that, but he may answer subject to the objection.

By Mr. Steiner:

Q. What is your opinion?

A. Well, with the contour mudflaps, there is a tremendous amount of sidespray from the wheels.

Q. And do you have any other basis for your opinion as to whether or not, from a safety standpoint, the contour mudflap is more hazardous?

A. Well, it's hard to check your tires in the morning because they are so close.

Q. What do you mean by "it's hard to check your tires"?

A. When we get out of a tractor, we always check the tires, and they set so close, it's hard to kick your tires with the contour mudflap on because it's encased in it.

Q. What other problem?

A. And it's always been the custom of truck drivers, the driver comes up behind you, and you have a flat tire, he immediately signals you or notifies you some way, and it's hard to notice a flat tire when it's encased like that.

Q. Have there been any problems encountered in connection with an accumulation of ice and snow while driving on the highway with the contour flap?

[fol. 150] A. Yes, I think so.

Q. In what respect?

A. It builds up in there, freezes, and it has to knock it off; no place to go.

Q. Were you able to reaffix the contour mudflaps which had become disengaged as a result of this blow out?

A. No, sir, I was not.

Q. Have you had occasion in driving on the highway to observe the condition of the splash from oncoming trucks and make a comparison between the splash created by a truck equipped with contour flaps and a truck equipped with conventional flaps?

A. Yes, I have.

Q. And on the basis of your experience, what have you found the fact to be?

A. Well, I found that with the conventional type mudflap the spray goes more to the back where with the contour, it cannot go back, it has to go out to the side.

Mr. Steiner: You may cross examine.

Cross examination.

By Mr. Husted:

Q. Now, Mr. Hayes, you stated that when you stopped this trailer up here in Indiana you got out, the tires were smoldering, and that both were blown, is that correct?

[fol. 151] A. Yes, sir.

Q. Aren't you able to tell when you blow the first tire if you were as an experienced a driver as you purport to be?

A. No.

Q. You are not able to tell?

A. Not all the time, no.

Q. So, you don't know whether they blew out together, or whether one blew out, and then the other one blew out, is that correct?

A. No, I wouldn't say for sure, but I believe——

Q. (Interposing) Did you——

Mr. Axelrod: Let the witness finish. He is beginning to finish.

The Witness: I believe that I blew one first and then the other on account of the weight.

By Mr. Husted:

Q. Well, now, a moment ago you said you didn't know.

A. No, I don't know. I said I believe.

Q. You believe. I see. And what would you say was the cause, and what was the result insofar as this tire and splash guard are concerned, which one had the first accident or misadventure of some type, the tire or the splash guard?

A. Which one had the first misadventure? What do you [fol. 152] mean?

Q. Did the tire blow first?

A. Well, yes, the tire blew first and caught on the mud-flap and tore it off.

Q. The tire was the cause of the difficulty, was it not, for the two tires?

A. I would say it was, yes.

Q. And the tearing loose of the splash guard was merely a result of this double blow out, is that correct?

A. I'd say it was.

Q. It's not too unusual, is it, Mr. Hayes, for a double blow out, or even a single blow out to cause further damage than to the tire itself?

A. Oh, they wouldn't cause much damage, no.

Q. You are going back now to your experience, your years of driving on the highway. Are you telling this Court that blow outs do not at times cause further damage than to the tire itself which has been destroyed by the blow out?

A. Oh, it could. I am not saying it doesn't. It's very possible.

Q. Now, you talked about these tires smoldering as though they had been quite hot or possibly even on fire. Do you have an opinion as to what caused that?

A. Yes.

[fol. 153] Q. What was that?

A. Well they both blew.

Q. And it was caused, was it not, from the friction of the deflated tires moving on the wheels in such time as you came to a stop, was it?

A. Right.

Q. And you wouldn't tell this Court that the splash guard had anything whatever to do with that, would you?

A. No. I am not saying that it did, but——

Mr. Husted: That's all.

Mr. Steiner: Let him finish the answer.

Mr. Husted: He has given me a complete answer.

Mr. Steiner: Have you finished your answer?

The Witness: No.

Mr. Husted: He has completely answered my question.

Judge Briggle: All right. If you want to ask him anything further, you may do so.

Redirect examination.

By Mr. Steiner:

Q. In response to the last question, did you have an explanation to make to your answer?

A. Yes, I did.

Q. Would you make it, please?

A. I am not saying that the contour mudflap caused [fol. 154] the blow out. I am saying they caught on it and tore them off.

Mr. Steiner: I have nothing further.

Judge Briggle: Is that all?

Mr. Steiner: Yes, sir.

(Witness excused.)

Judge Briggle: Do you have another short witness?

Virgil Segraves called as a witness by and in behalf of the Plaintiffs herein, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Steiner:

Q. What is your name, please?

A. Virgil Segraves.

Q. And where do you reside?

A. 900 Fountain Place, St. Louis, Missouri.

Q. And with what company are you associated?

A. Be-Mac Transport Company.

Q. And are they a common carrier of freight by motor vehicle?

A. They are.

Q. What is your position with that company?

A. At the present time I am safety director.

[fol. 155] Q. Leaving your position for the moment with Be-Mac, have you personally been involved in any unusual experience or accident involving a contour mudflap?

A. Yes, I have.

Q. When did this occurrence take place?

A. I believe it was on the morning of the 30th of October, '57.

Q. And where did this accident occur?

A. Approximately four miles south of Edwardsville, Illinois, on U. S. Route 66.

Q. And in what direction were you traveling at this time?

A. I was headed in a northerly direction towards Edwardsville from St. Louis.

Q. And were you driving a passenger vehicle at the time?

A. I was.

Q. Will you tell the Court exactly what happened at this time and place?

A. It was at a point where 157, Route 40 and 66 form a "Y" at the foot of Sunset Hill, approximately four miles south of Edwardsville. I was meeting two trucks, one coming from the right on 157 and one coming down the hill off of No. 66. And as the lights were blinding to a certain extent, I slowed down and started to negotiate the curve. I noticed [fol. 156] sparks flying from my side of the pavement, and I thought that it was a chain that was dragging or bumping from this truck on the pavement.

Q. He was coming south on U. S. 66?

A. Yes. As I saw this, I pulled to the right in the part that forms the "Y" where the highways split, and I immediately stopped, and as I did, a contour mudflap slid down the pavement, struck my right front wheel, bounced

off and went to the other side of the "Y" portion of the dirt and hit the pavement and stopped.

Q. Now, if you had not stopped your vehicle and pulled it off the side of the highway, do you have an opinion as to what result there might have been insofar as your vehicle and you personally are concerned?

A. Well, if I hadn't of stopped at the time, it probably would have crashed right through the front of my car. It was skipping and bouncing on the pavement.

Q. Now, Mr. Segraves, getting back to your position with Be-Mac Transport Company, how long have you held the position of safety director?

A. For the last three years.

Q. And prior to that, what position did you hold with the company?

A. I was superintendent of operations.

[fol. 157] Q. Now, as safety director, what do your duties embrace?

A. Well, it embraces holding safety meetings, driver training and equipment inspection and checking our schedules on the highways and various other safety matters.

Q. And in the course of your duties, do you traverse up and down the highways of various states through which your company operates observing your vehicles on the highway?

A. Yes, I do.

Q. Through what states does your company operate?

A. Missouri, Illinois, Oklahoma.

Q. Is all of your operation in Illinois wholly in interstate commerce?

A. It is.

Q. Now, as superintendent of operations, what do your duties include?

A. My duties were to maintain schedules, expedite the freight and I had quite a bit of control over interlining of freight, interchange, in trailer interchange between various other carriers we are connected with.

Q. In your experience, were you ever employed as a driver?

A. Yes, 16 years.

[fol. 158] Q. Are you familiar with the Illinois Contour Mudflap Law?

A. I am.

Q. Has your company purchased any of those contour mudflaps?

A. I believe we have between 30 and 40 now installed.

Q. Now, after they were affixed, did you have occasion to observe your vehicles while operating on the highway equipped with contour mudflaps?

A. Oh, yes, we ran many tests.

Q. And have you personally had occasion to observe vehicles on the highway which have been equipped with contour mudflaps and compare the splash or lack of splash on those trailers with trailers operated by your company with the conventional mudflap?

A. Oh, yes, I and our equipment maintenance man made several tests in that respect.

Q. How did you make these tests?

A. By following behind the driver in an automobile and observing the amount of splash and how much dirt our windshield picked up, and then dropping back and probably following another trailer the same night with the conventional type of flap.

Mr. Husted: If Your Honors please, I would like to renew my objection. It's completely immaterial that some [fol. 159] other type of splash not required by the law might be just as effective, or relatively effective with this one, if this one is.

Judge Briggle: That is probably true, except for the fact that some other type of splash guard might be just as effective or more effective, which isn't the problem of this Court. This may have some bearing on the question of safety, however, and your assertion is that this is a problem of safety so far as the police power of the state is concerned?

Mr. Husted: That is correct. But when we get to the question of comparing the old style with the new, unless this Court is in position to say, "All right, we will knock out the new and reinstate the old," which I submit that it is not, it isn't materia.

Judge Briggle: Let him answer subject to the objection.
Mr. Steiner: Read the question.

(Question and answer read by Reporter.)

Mr. Steiner: Was that the finish of your answer?
The Witness: Yes.
Judge Briggle: The objection, I suppose, was to the answer, then. The objection is overruled. Go ahead.

By Mr. Steiner:

Q. Based upon your observation, did you come to any [fol. 160] conclusion as to whether or not there was a greater splash occasioned by the use of contour flaps as compared to the use of conventional flaps?

A. You mean a greater amount of splash?

Q. Side splash, as a result of contour flap?

A. I could hardly tell any difference at all, as far as the amount of splash. As we all know, the wheels pick up a certain amount. It seems to me on older type the water that the wheel picked up had more room to disappear rather than hit a fixed object immediately after picking it up from the ground which naturally splashed and caused a spray.

Q. Has your company had any experiences in connection with the problems as related by Mr. Gaughen in keeping the contour flaps securely affixed to your trailer?

A. Oh, I doubt if we have any of the original ones yet. In the last year we have probably replaced the whole fleet that we had installed at one time or other.

Q. Does your company participate in a substantial amount of interchange of trailers in connection with its operations in Interstate Commerce?

A. Yes, we do.

Q. And among other things, does your company participate on a regular basis in trailer interchange of traffic going to and from the State of Arkansas?

[fol. 161] A. Oh, yes, we do.

Q. And is that with a number of carriers?

A. I believe there are four or five carriers we interchange with.

Q. And you are familiar with Exhibit 8, the Arkansas Statute?

A. Yes.

Q. And in your opinion, if I were to ask you the same questions that were asked Mr. Crosby with respect to your ability to conduct operations to and from Arkansas, would your answers be the same?

A. Yes.

Mr. Husted: I object. There's been no Arkansas Statute submitted to this Court.

Mr. Steiner: The order of the Arkansas Commission.

Judge Briggle: What do you do with your trucks when they get to the Arkansas line when they are equipped with the contour splash guard?

The Witness: So far, we haven't sent any of those down there with the contours yet. We only have a small amount of our trailers equipped with them. We have managed to keep the ones that have been equipped with them out of Arkansas up to this point.

Judge Briggle: I see.

By Mr. Steiner:

[fol. 162] Q. Has that created a problem in your operations?

A. Well, yes. You never know where you are going to have a trailer with the contour that has been installed ready, and you never know, that is, you can't control your fleet to that fine point to have a certain amount of trailers at a point of a certain type.

Q. If you are going to be required to equip all of your trailers with contour mudflaps, how is that going to affect your operations moving to and from the State of Arkansas, bearing in mind the order of the Arkansas Commission?

A. As I stated before, you couldn't run your trailers through the state. They wouldn't be allowed.

Q. How would that affect your operation?

A. We would lose quite a bit of business, I suppose, because we interchange quite a bit of freight with the Arkansas carriers who travel in the State of Arkansas.

Mr. Steiner: I have nothing further. I submit the witness for cross examination.

Judge Briggle: Do you have any questions?

Mr. Husted: Very briefly, if Your Honors please.

Cross examination.

By Mr. Husted:

Q. Referring to this instance of your story, Mr. Segraves, [fol. 163] of the contour splash guard coming down the highway either on or coming off of oncoming traffic, did you see that come off the truck?

A. No, sir.

Q. It didn't come off in your view, is that right?

A. No, sir. It was bouncing along the road about 15 or 20 feet behind it when this particular truck came into view.

Q. I see. Do you know what caused it to come off?

A. No, sir. It was dark. I couldn't tell.

Q. Are you familiar with any of the kind of installation that it was equipped with insofar as brackets and attachments are concerned?

A. I never saw the trailer. The trailer went on by me.

Q. For all you know, that truck might have been engaged in a sideswipe wreck with some other truck?

A. There were no trucks around at the time.

Q. I mean some miles back?

A. I have no way of telling.

Q. Or someone might have taken a sledge hammer or knocked that off, that is conceivable too, isn't it, as far as you know, Mr. Segraves?

A. I only saw the mudflap bouncing on the highway.

Q. And is that the only instance of a contour mudflap [fol. 164] you have seen in your travels over the state, Mr. Segraves, that was dragging or had fallen from the trucks?

A. No. I have seen several that were hanging loose. In fact, one this morning from Chicago hanging by one bolt on a Scherer Freight Lines trailer.

Q. And is it your belief that the proper attachment of these splash guards is beyond the capability of safety engineers of your industry?

A. Well, I'd have this to say: I think the last batch we bought was about 10 or 12 sets, and we called a man from the factory. He was down about five hours from our garage, and he said he didn't know how to put them on and make them stay. I don't know just what company that man was from. I heard our equipment man talking about it.

Q. Did that lead you to conclude that they couldn't be put on by engineers?

A. I have never indicated that I didn't think they could be put on, no.

Mr. Husted: I think that is all, sir.

(Witness excused.)

(Whereupon, a discussion was had off the record with reference to evidence yet to be presented, after which the following occurred:)

[fol. 165] Judge Briggle. See if you can arrange a stipulation as to those matters that are apparently not in controversy, and we will recess at this time until 1:30.

(Whereupon, the hearing in the above-entitled cause was continued until 1:30 P. M. of the same day.)

[fol. 166] AFTERNOON SESSION

Judge Briggle: You may call your next witness.

Mr. Axelrod: If the Court please, Mr. Stephenson has a witness which he would like to present.

Judge Briggle: All right.

WILLIAM G. KARSTEN called as a witness by and in behalf of the Plaintiffs herein, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Stephenson:

Q. Will you state your name, sir?

A. William G. Karsten.

Q. And where do you live?
A. Fort Smith, Arkansas.
Q. And by whom are you employed?
A. Arkansas-Best Freight System, Incorporated.
Q. And what is your position with that company?
A. Director of labor and safety.
Q. Briefly, what are your duties, sir?
A. Well, primarily the establishment and enforcing of a safety program, screen, train driving personnel, furnish our operating department with the type of personnel necessary to move our traffic efficiently, and to assist the [fol. 167] operating department of any problem they may have with respect to moving the traffic over the road or in a local situation.
Q. How long have you been employed by this company?
A. About 2½ years.
Q. Have you had any experience prior to that time?
A. Yes, sir.
Q. Just in how many years?
A. Since 1932.
Q. Are you familiar with the operating authority of Arkansas-Best as issued by the Interstate Commerce Commission?
A. Yes, sir, I am.
Q. I show you what has been identified as Exhibit 11 and ask if that is a copy of the operating authority of that company?
A. Yes, it is.
Q. Now, for clarification, on the first page of the exhibit, I noticed the name "Arkansas Motor Freight Lines, Inc." Is that the corporate name of the company at the present time?
A. No, sir, it isn't.
Q. What is the corporate name?
A. Arkansas-Best Freight System, Inc.
Q. Did the Arkansas Motor Freight Lines merge with [fol. 168] Best Freight Lines causing the change in name?
A. They merged with the Best Motor Freight, Inc.
Q. Now, the authority that was issued to the Arkansas Motor Freight Lines, Inc., has that as yet been reissued,

or is it subject to being reissued by the Interstate Commerce Commission showing the new name?

A. My understanding is that it's subject to being issued by the Interstate Commerce Commission under the new name.

Q. At any rate, the authority as outlined in Exhibit 11 is the authority of the present corporation?

A. Yes, sir, it is.

Q. Now, without going in detail in Exhibit 11, but will you tell us what states your company operates in or through?

A. Ohio, Indiana, Illinois, Missouri, Arkansas, Tennessee, Louisiana, Texas, Oklahoma.

Q. And is that what is commonly referred to as a regular route and on-schedule operation?

A. Yes, it is.

Q. In other words, you have a system that is operating as much as possible on a schedule, the same as some trains or buses, is that right?

A. Yes, sir.

Q. And the commodities that you transport, are they [fol. 169] referred to in the authority as general commodities with some exceptions?

A. That is correct.

Q. Now, is this corporation an Arkansas corporation?

A. Yes, it is.

Q. And where is its principal place of business?

A. Fort Smith, Arkansas.

Q. Now, in order to do business as an Arkansas corporation, and being domiciled in Arkansas, are you subject to the rules and regulations of the Arkansas Commerce Commission?

A. Yes, we are.

Q. And is that in a similar way that you are subject to the rules of the Interstate Commerce Commission when it involves interstate commerce?

A. Yes, sir.

Q. Now, there was mention made earlier in testimony of an Exhibit 8 concerning a regulation of the Arkansas Commerce Commission. I will just hand this to you to re-

fresh your memory, sir. Are you familiar with that order indicated in Exhibit 8?

A. Yes, I am.

Q. Now, are you also familiar with the law of the State of Illinois with respect to the contour mudflap that is being discussed in this case?

[fol. 170] A. Yes, I am.

Q. Tell us what, if anything, your company did or has done or is doing with respect to complying with the Illinois law?

A. Our company purchased some of the contour mudflaps and installed a few of them. With the issuance of the Arkansas order, we stopped the installation immediately because of the possibility the contour flaps may have to come off in that we would be in conformity with the order, of our home state.

Q. Well, now, you are subject to the rules and regulations of this Commission. Now, is it the policy of your company to comply with all rules and regulations of the administrative bodies that govern transportation?

A. Yes, we attempt to do that.

Q. And also with respect to the various state laws?

A. That is correct.

Q. Well, now, will you let me ask you: You say that you are complying with the Illinois law prior to the first of this year by putting on some contour mudflaps?

A. Yes, sir.

Q. And with the issuance of the order in Exhibit 8, you say you ceased then putting on the contour mudflaps?

A. That is my understanding. They stopped putting them on.

[fol. 171] Q. Well, with respect to your other equipment, is it in compliance at the present time with the Arkansas Commerce Commission's order?

A. Yes, it is.

Q. You have the type of mudflaps that's referred to in Exhibit 8?

A. That is correct.

Q. Now, let's take an operation from Arkansas. Do you use the same equipment from Arkansas into Illinois, or do you try to keep certain pieces of equipment just for Illinois?

A. No, our equipment is established and maintained in a manner that it's flexible enough to operate on any part of our system, whether it's in Cleveland, Ohio or Eastern Texas.

Q. Where do you have terminals?

A. Cleveland, Akron, Columbus, Dayton, Springfield, Indianapolis—that is Springfield, Ohio—Indianapolis, Toledo, Chicago, St. Louis, Kansas City, Fort Smith, Arkansas, Fayetteville, Arkansas, Little Rock, Hope, Texarkana, Malverne, Hot Springs, Eldorado, Camden, Monticello, Pine Bluff, Memphis, Tennessee, Shreveport, Louisiana, Dallas, Texas, Fort Worth, Texas, Wako, (sic) Texas, Austin, San Antonio and Huston. (sic)

Q. Now, is the equipment of your company dedicated [fol. 172] or delegated to each of those terminals, that is, you have so many pieces here and so many pieces there?

A. No, sir.

Q. Is the equipment moved then with flexibility between terminal points?

A. That is correct.

Q. Are you operating at the present time in interstate commerce between Arkansas and Illinois?

A. Yes, we are.

Q. What kind of mudflaps do you have on the equipment that is now moving between those two states?

A. The conventional type as referred to earlier in this hearing.

Q. Well, if you have to comply with the Arkansas regulations that you are holding there in your hand, Exhibit 8, and you have to comply with the Illinois law, how do you propose to operate between Arkansas and Illinois?

Mr. Husted: I object to the form of that question, Your Honor.

Mr. Stephenson: He must have something in mind. He is going to have to operate some way.

Judge Briggle: I think he may answer that.

The Witness: To be honest, I don't know how we would operate. If I may elaborate a little further, our point of entry into Illinois is in St. Louis, Missouri, and our opera- [fol. 173] tion would just stop right at St. Louis. If we

conform with Illinois, we would be able to operate south as far as Arkansas, and then be in violation, or we would not be permitted to operate east of St. Louis because we would be in violation of Illinois law. So, we would be at an impasse.

By Mr. Stephenson:

Q. How many pieces of equipment are you regularly moving into Illinois now?

A. Into Illinois and through we operate approximately an average of 21 a day in each direction, making a total of approximately 42.

Q. So, insofar as your company is concerned, there are 42 pieces of equipment daily that is under consideration insofar as you are concerned in this proceeding?

A. Yes. I would say that there is a total of an average of 42 pieces of equipment operating east of our St. Louis Terminal in and out of that terminal daily.

Q. Now, did you hear Mr. Crosby testify this morning?

A. Yes, I did.

Q. And I believe he testified that he interchanged trailers with your company at Kansas City, is that correct?

A. That is correct.

Q. Will it be possible for you to continue in interchange trailers with Watson Bros. at Kansas City for traffic moving into Illinois if your are in compliance with your own [fol. 174] Commerce Commission's order?

A. If we are in compliance with Arkansas, and Watson were to be in compliance with the State of Illinois, I believe there, too, we would hit another impasse. They would not accept our trailers; we could not accept theirs.

Mr. Husted: I object to that answer as being incompetent on the ground that it involves a construction of the Illinois Statute and the Arkansas regulation, which is a matter for this Court, and I challenge Plaintiff to show anywhere in the Arkansas regulation that it is made illegal or unlawful to equip a truck with a contour splash guard meeting the specifications of the Illinois Statute in question.

Judge Briggle: The answer may stand subject to the objection.

Mr. Stephenson: Let me ask you, sir: Without reading the order, will you describe, since you are a director of safety for your company, just exactly what type of mud guard is required by Arkansas?

A. Arkansas requires a perpendicular, flexible type mud guard hanging at a right angle from the trailer, and I might further say it's my understanding that their order reads that it will be ordered that all equipment shall be, or shall carry such a splash guard on it.

[fol. 175] Q. Now, are you also familiar with the contour type that has been discussed here?

A. Yes, I am.

Q. Is it possible to put both types on at the same time?

A. No, it isn't.

Q. Has to be either one or the other?

A. That is correct.

Mr. Husted: I object to that as being a conclusion. Let him show why they can't both go on, if the State of Arkansas insists on both going on.

Judge Briggle: I suppose you could carry both types of splash guards, and when you are entering Illinois put on the contour type, and when you return to Arkansas you could take those off and put on the other type. Did you ever consider doing that?

The Witness: We have approximately 400, about 412, if I am not mistaken, 35-foot high cube van trailers with sliding tandems. All of our trailers have the sliding tandem described by the gentleman of the Consolidated Freight Ways earlier today, and we therefore would have the similar problem.

Also, we normally operate our equipment with the tandem to the extreme rear, and to put two mudflaps on there would not be permissive, in my opinion, would not [fol. 176] permit the axle to go to the extreme rear to where we could enjoy the maximum gross weight as permitted by the Bridge Law in the State of Missouri.

Judge Briggle: Well, you are saying by that that you can't equip your trailers with the two at the same time. I didn't mean that. I mean, to carry an item inside of your

trucks of the one type and make the changes at the state lines?

The Witness: Well, that would entail quite a maintenance program and a terrific additional maintenance cost because we do all our maintenance work, all our major maintenance work at our Little Rock shop, and other points such as St. Louis and Fort Smith are merely emergency service points.

Judge Brittle: (sic) Would you have any difficulty in doing that with reference to trailers that you pick up belonging to other companies?

The Witness: Yes, we would.

Judge Briggle: What would that be?

The Witness: Well, for an example, we haul explosives from the Red River Arsenal in Texarkana, and there is one specific carrier I can think of now, Red Ball Motor Freight, who operates primarily in Louisiana and Texas. They also haul a lot of explosives out of there and when that arsenal calls our Texarkana terminal manager to come out [fol. 177] and get "X" number of loads, they do not take in regard whose trailer it is, but they merely load so many trailers going in our direction, and we go out there and pull those trailers.

If they were to load those on a Red Ball trailer, and Red Ball, being a Texas domiciled carrier, we would be all right with his mudflap until we got to the Illinois line. Then, we would have to stop there and add the contour mudflap, operate it east of St. Louis, and when it returns to St. Louis, we would have to remove it and the contour mudflap, having to be welded, we would have quite a problem welding them on and several days later going in there and attempting to take them off.

Further, under the interchange carrier agreement, we would have to contact Red Ball Motor Freight in Dallas, Texas, and receive their authority to add this contour mudflap to their pieces of equipment.

Mr. Stephenson: I would like to offer Exhibit 11 and tender the witness. Thank you.

Judge Briggle: It may be received.

(Whereupon, Plaintiffs' Exhibit No. 11 was received in evidence.)

Mr. Husted: No questions.

Mr. Axelrod: May I ask a question of this witness, Your Honor?

[fol. 178] Judge Briggle: You wish to examine this witness?

Mr. Axelrod: May I, please.

Direct examination (continued).

By Mr. Axelrod:

Q. With a load of explosives, would you be in position to weld the contour mudflap on the trailer?

A. Definitely not.

Q. Why?

A. Because of the danger of explosion, fire, and things of that nature.

Mr. Axelrod: That is all.

Judge Mercer: May I ask a question, Judge Briggle.

Are there any kind of flaps in use in the United States on trucks other than the flap that is contemplated under the Arkansas Commission order and the contour flap?

The Witness: To my knowledge, those are the only two that I recall.

Judge Mercer: Is this flap under the Arkansas order the same flap that was used in Illinois prior to 1955?

The Witness: Yes, the perpendicular type.

Judge Mercer: The same type?

The Witness: At the rear of the trailer, yes, sir.

Judge Mercer: All right.

(Witness excused.)

[fol. 179] Judge Briggle: Call your next.

Are you proposing to show that each of these Plaintiffs has a certificate of public convenience and necessity from their respective states? Isn't that conceded?

Mr. Husted: Yes.

Judge Briggle: Conceded as far as all the Plaintiffs are concerned?

Mr. Husted: Yes.

Mr. Axelrod: May the record show, please, Your Honor,

that Exhibit 12 is the Denver-Chicago Trucking Company certificate, Exhibit 13 is the map of Denver-Chicago Trucking Company depicting its operation, and Exhibit 14 is the list of carriers with whom traffic is interchanged by Denver-Chicago Trucking Company, and that they are stipulated into evidence by agreement of the parties.

Judge Briggle: 12, 13 and 14 in evidence by stipulation.

(Whereupon, Plaintiffs' Exhibits Nos. 12, 13 and 14 were received in evidence.)

[fol. 180] WILLIAM J. BLOHM called as a witness by and in behalf of the Plaintiffs herein, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Axelrod:

Q. Will you state your name and address, please?

A. William J. Blohm, 3015 South Cook Street, Denver, Colorado.

Q. Mr. Blohm, you are associated with the Denver-Chicago Trucking Company, are you not?

A. Yes, I am.

Q. In what capacity, please, sir, stating your duties and responsibilities?

A. I am the vice-president of Denver-Chicago concerned with highway operations and maintenance for the entire system which operates from New York to California and Washington.

Q. Your company is a transcontinental carrier, is it not?

A. That is true.

Q. Operating in part from New York to California?

A. Yes, sir.

Q. Please, sir, indicate the background that you have [fol. 181] had personally, and I ask you particularly whether you have had an engineering background?

A. Yes. Graduated from Villanova College of Engineering, Philadelphia, mechanical engineer.

Q. When, sir?

A. 1940.

Q. Since that time, what kind of work have you been engaged in?

A. Been in the trucking business for about 14 or 15 years.

Q. Is the Denver-Chicago Trucking Company proud of its safety record?

A. Yes, we are.

Mr. Husted: Object to that as being immaterial whether they are proud.

Judge Briggle: I guess I will sustain that.

Mr. Axelrod: I am skipping, if Your Honors please, with respect to this witness' testimony as to the number of miles operated out of Illinois, the number of miles operated in Illinois, the revenue derived from its operation and those matters which are alleged in the complaint. I am doing that on the assumption that perhaps we could save time by not attempting to prove or establish those allegations in the complaint. I believe Mr. Husted has no objection to that. I point that out because the answer of [fol. 182] the state denied all of these allegations in the complaint, and technically I'd be bound to establish them in this Court, but I am purposely skipping that type of information in the interest of time. Is that satisfactory?

Mr. Husted: Yes, that is satisfactory. We didn't deny them. We say we had no information or knowledge on them.

Mr. Axelrod: Which puts me on proof of them, of course. They didn't admit them which put me on proof of them, and in order to avoid proof at this point, under the assumption, I take it, Mr. Husted——

Mr. Husted: We are willing to stipulate that they have extensive operations, that they operate in interstate commerce.

Judge Briggle: You don't challenge the allegations of the complaint in that respect?

Mr. Husted: No.

Mr. Axelrod: May I ask, just in the interest of brevity, would that be true for the other Plaintiff, too, Mr. Husted, as to this point? That would further assist our time problem. Essentially, we say the same thing on behalf of each Plaintiff with respect to miles traveled, percentage of miles,

amount of tonnage handled, that the operations are interstate.

Mr. Husted: Yes. We will stipulate to that. Defendants will, Your Honor.

[fol. 183] Judge Briggle: Very well.

By Mr. Axelrod:

Q. Mr. Blohm, does your company, among others, operate in the States of Idaho and Oregon?

A. Yes, we do.

Q. Mr. Blohm, have you carefully analyzed the answer filed by the State of Illinois in response to the complaint here which described in the answer the kind of mudflap statutes which are required in the States of Idaho and Oregon?

A. Yes. I have examined the answer.

Q. Are you familiar with the requirements of the States of Idaho and Oregon in this respect?

A. Yes, I am.

Q. With what kind of mudflaps are your vehicles equipped today, sir?

Mr. Husted: I object to that question, Your Honor. The matter of construing the Oregon and Idaho Statutes are a matter for the Court. I have appended to our answer verbatim those statutes. I don't think it's the province of a witness, even an expert witness, to inform the Court as to the meaning of the language of that statute.

Judge Briggle: Very well. Of course, I would accept that, but the question now is what kind of flap guards, do his trucks carry.

The Witness: We are using the so-called conventional, [fol. 184] as we are calling it here, on all of our equipment.

Judge Briggle: You mean by that, those shown in Plaintiffs' Exhibit 3, do you?

The Witness: Yes, I do.

By Mr. Axelrod:

Q. Are your vehicles carrying the conventional mudflaps operating through Idaho and Oregon under your Interstate

Commerce Commission certificate and in the course of its operations?

A. Yes, they do.

Q. Mr. Blohm, when the Illinois Contour Statute was passed, did you on behalf of your company investigate into the purchasing and equipping of your vehicles with the contour mudflaps?

A. Yes, we did.

Q. And can you tell me, sir, what investigation you made and what determination you made with respect as to whether or not you desired to equip your trailers with the contour mudflaps?

A. We invited all of the manufacturers at that time that we could contact who had representatives in the areas within which we operated to have them display their wares.

After seeing what was available and seeing the type of mounting recommended, we determined then that it was an unsafe appliance and attempted to convince others of that fact.

[fol. 185] Q. Tell me, sir, did the matter of expense, from the standpoint of equipping your vehicles with the contour mudflaps, have anything to do with your determination in that respect?

A. No. We are primarily concerned with safety per se, and we would have hung them on there if we thought they were safe.

Q. Are you today equipping your vehicles with many appliances which are not required by any state laws and which are expensive of character in the interest of safety?

A. That is true.

Q. Will you give us an example of some of that?

A. We are using 10 to 12 inch mirrors, that is, a rear view mirror, one on each side, when the laws themselves require from 6 to 8 inches. In addition to that, operating in certain areas, we equip these mirrors with heating elements to keep the frost from the mirrors, which, although not required by the law, is in the interest of overall safety, and based upon that then, I think I answer your question that we do go to things such as that to add to safety.

Q. Has your company been adjudged the safest carrier operating transcontinentally in this country?

A. Yes. As of July 1st, the National Safety Council's contest, our category, as far as DC is concerned, we are [fol. 186] the——

Q. (Interposing) When you say "DC", are you meaning Denver-Chicago?

A. Yes.

Q. Mr. Blohm, you said you looked into the question of purchasing the contour flaps but decided that it was not safe. Will you explain why?

A. Primarily because the appurtenance itself must be of rigid nature. Although the contour itself is sometimes made of a semi-flexible material, the support of that flap has to be made with metal strapping or metal bracing which must be affixed to the bed or floor of the trailer, and when these units become detached and fall in the roadway of the nation's highways, an accident is bound to result.

I have particular reference to the spars out on the west and to some of the canyons we have to run through in Washington and Bluebird Hill, etc., where there are switchbacks, and the oncoming public can't see these objects in the road and are bound to run over them.

Q. What do you mean by "spars" in the west?

Mr. Husted: I object to this line of questioning, Your Honor. There is nothing in the Illinois Statute that requires these Plaintiffs to use these splash guards anywhere except in Illinois. If there are problems elsewhere, [fol. 187] they are not the result of this statute.

Mr. Axelrod: If Your Honors please, I believe we have connected this material.

Judge Briggle: He may finish his answer.

The Witness: A spar is a canyon area running through Arizona and in California on a route that we are authorized to operate over.

By Mr. Axelrod:

Q. Now, sir, in your investigation, did you determine whether or not the contour flap did any more from the standpoint of preventing splash or spray than the conventional mudflap?

Mr. Husted: I object to that as being immaterial.

Mr. Axelrod: I think the state is going to argue, if I may anticipate, Your Honor, that the purpose of the act is to prevent splash and spray. In fact, we will cite the Warren case on that, Your Honor. I think we have a right to discuss the question.

Judge Briggle: I suppose we are concerned with the element of safety, aren't we?

Mr. Husted: Very vitally, Judge Briggle.

Judge Briggle: I suppose it will become the province of this Court to determine whether the elements of the safety that apparently brought about the enactment of the Splash Guard Law under the police power, whether they outweigh the inconvenience and interruptions in interstate [fol. 188] commerce. Isn't that one of the things?

Mr. Husted: That is very definitely one of them.

Judge Briggle: You may proceed.

Mr. Husted: But the comparison between the two types of flaps has nothing whatever to do with it.

Judge Briggle: I would think that would enter into the question of safety.

Mr. Axelrod: Could the question be answered, Your Honor, that I believe is before the witness?

Judge Briggle: Do you have the question, Mr. Witness?

The Witness: No.

Mr. Axelrod: Would you mind reading the question?

Judge Briggle: Read the question.

(Question read by the Reporter.)

The Witness: In our investigation or looking into it, we found the conventional type or the type we have been using is far superior to this new device.

By Mr. Axelrod:

Q. Why do you say that, sir?

A. Primarily because the device that is about to be placed on the vehicles, or that is involved here, sets so close to the wheels themselves that it doesn't control the side spray.

The further back the guard is or the mudflap itself is, it catches more of this residue from the highway and from

the pavement, and it fits in more with the airflow of the [fol. 189] vehicle when at the rear of the vehicle comes to a point.

The material then that is splashed from the side of the duals or from the tandems is caught by the flap as we now know the conventional flap where it isn't caught by this contour.

Q. What do you mean "duals or tandems"?

A. Two tires on a wheel, two tires on a wheel, and a tandem is four tires or two wheels in a row.

Q. On the back of the trailer?

A. Back of the tandem trailer, yes.

Q. Have you determined whether or not the contour mudflap would have a tendency to generate heat and thereby affect the tire or the braking qualities of the vehicle itself?

A. Yes, we have.

Q. Will you tell us about that?

A. The fact that the device is placed so close to the running treads of the tires adds to the fact that the heat generated by the tires can't go anywhere but be trapped locally. And other than the movement of the tire or the vehicle itself, which creates an airflow around the tire, other than that, the heat would stay there. Based upon that, it would create excess of heat in the tires themselves, and thereby weaken the tire itself and add to the possibility [fol. 190] of premature tire failure.

Q. Does your company in connection with its operations use retread tires or recap tires?

A. Yes, we do quite extensively.

Q. Did you hear the testimony of the witness Hayes, the Cooper-Jarrett Company?

A. Yes, I did.

Q. Have you had any instances happen in your operations where parts of the recap would fall away from the carcass of the tire in connection with an operation of the vehicle over the road?

A. Yes, we have.

Q. And tell me what would happen if that—strike that, please.

You said you have had that fact happen. Has that happened in connection with your vehicles equipped with the conventional mudflaps?

A. Yes.

Q. Has it in such instances broken the conventional mudflaps off the vehicles?

A. No.

Q. Why not, sir?

A. Well, the conventional mudflap isn't close enough to the tire to become involved, and it's flexible enough in nature so that it can curl with the cap itself when it comes [fol. 191] loose.

Q. What do you mean by "flexible in nature" as contrasted with, for instance, the rigidity of the contour?

A. The contour flap itself is a fixed shape or firm shape, whereas the conventional mudflap is flexible and hangs like a curtain and is made up of very flexible material, can easily be bent and twisted by hand.

Q. Unless compelled to do so by the declaration that this law is valid, and you must comply with the Illinois Statute, would you on your own accord change your trailer vehicles and equip them with the contour mudflap?

A. Unless forced by law, we would not, no, sir.

Q. Why, sir?

A. Again, I mention because we don't feel it's safe.

Q. Did you hear the testimony of Mr. Crosby?

A. Yes, I did.

Q. Is your company from the standpoint of its kind of service, its interchange trailer arrangements and its business, does it do the same as the Watson Bros. Company?

A. Yes, we do.

Q. You compete with Watson Bros., do you not?

A. Yes, we do.

Mr. Axelrod: That is all I have on direct examination of this witness, if the Court please.

[fol. 192] Cross examination.

By Mr. Husted:

Q. You stated, Mr. Blohm, that in your opinion the old style flap controlled side splash and spray better than the contour type of splash guard, is that correct?

A. Yes, sir, I did.

Q. Would you explain to me and to the Court how this apron or flap hanging behind the wheel in any way controls side splash and spray from the rear wheels of a truck?

A. It controls it in this sense, as I mentioned, controls it more than a contour mudflap.

Q. I know, but why?

A. Primarily because the residual material on the highway, or precip, whether snow or rain or ice or sleet, kicked up by the wheels, must go to the side and the on-rushing vehicle. The movement of it there beside it, which is logical to follow and can be seen by films that are available, as the vehicle moves forward and creates this onrush of air, that air then swirls to the back of the vehicle, and, as it swirls to the back of the vehicle, it takes this moisture, it takes this resid up off the ground and tends to bring it under the vehicle or up behind the vehicle.

[fol. 193] Most of the trailers that are running up and down the highway, when it's snowing, you can look at the back end of them, and they are covered with snow as high as 6 or 7 inches and all of the back and the sides.

Q. Now, actually speaking, if it sprays this material to the side, it's not going to strike or come in contact with this apron flap, is it?

A. It will if the vehicle is moving, and you wouldn't get a splash if it weren't moving.

Q. Would you tell me that again, please?

A. You wouldn't get a splash if the vehicle weren't moving, and if the vehicle is moving, you are going to have some air or some wind that will push it back in underneath the wheels.

Q. Oh, I see. You are relying on the air currents to pull it back, is that your theory?

A. Well, you wouldn't have splash unless the vehicle moved.

Q. I see. Now, referring to these mirrors that you mentioned where you exceeded normal state requirements, actually, those mirrors are primarily for your own protection, are they not?

A: Well, I don't know what you mean by our own "protection."

Q. Protection os (sic) your own driver and for your own [fol. 194] vehicle and for his convenience, whereas the splash guards are for the convenience of other persons on the highway?

A. No, that isn't true.

Q. You don't believe that?

A. No, sir.

Mr. Husted: Thank you.

Judge Briggle: Is that all of Mr. Blohm?

(Witness excused.)

Judge Briggle: Call your next.

JOSEPH H. DOLAN called as a witness by and in behalf of the Plaintiffs herein, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Steiner:

Q. What is your name, please?

A. Joseph H. Dolan.

Q. Where do you reside, Mr. Dolan?

A. 466 West Dayton Street, Galesburg, Illinois.

Q. What is your business or occupation, sir?

A. I am general manager of the Mechanical Department of Burlington Truck Lines.

Q. And is Burlington Truck Lines a common carrier engaged in the transportation of freight by motor vehicle? [fol. 195] A. Yes, they are.

Q. What do your duties consist of?

A. I am charged with the responsibility of the specification, procurement and maintenance of our motor equipment.

Q. And how long have you been associated with Burlington Truck Lines?

A. Since October of 1952.

Q. Prior to becoming associated with that company, what has been your experience in connection with motor carriers and engineering?

A. From 1937 until World War II, I was engaged in the operation and maintenance of motor trucks and construction equipment, and I joined the U. S. Army in 1942 and was engaged in the operation of construction equipment on the Alaskan Highway until 1943.

I went to Officers Candidate School and was assigned as a motor transport officer in the corps of engineers and was responsible for the maintenance of automotive and construction equipment for a construction regiment until the end of the war.

Following that, I was an instructor at the Hemel Diesel School in New York City teaching the operation and maintenance of diesel engines, and at that same time was engaged in the procurement of construction and automotive [fol. 196] equipment for the Morrison-Knudsen Company.

Thereafter, I was a service engineer for Mac (sic) Trucks, Incorporated, investigating field problems in the operation and maintenance of motor truck equipment until 1952 when I joined the Burlington Truck Lines.

Q. Are you a member of any engineering society connected with the motor carrier industry?

A. Yes. I am a member of the Society of Automotive Engineers. I am a member of their transportation and maintenance technical committee. I am the chairman of subcommittee on brake problems. I am also a member of the Common Carrier Conference Maintenance Committee and the vice-chairman of their Methods Subcommittee.

Q. Now, in connection with your duties with Burlington Transportation Company, and also in connection with your duties on these committees with the Society of Automotive Engineers, have you made a substantial and quite an exhaustive study in connection with the uses of contour mudflaps on trailers?

A. Yes, I have.

Q. And when did you start making that study?

A. When the law was first being considered in 1955. I obtained a copy of the law. Upon reading it, I found it to be somewhat vague in its specifications. I requested a drawing from the Department of Public Safety of the State [fol. 197] of Illinois which showed how the contour mudflap was to be mounted. I saw that drawing and the method of mounting the contour mudflap. I was concerned that it would have a shrouding effect on the air flow through the wheel of the tire.

At that time, however, the 1955 bill was repealed, and I later obtained a copy of the bill which is now in effect, and I was and still am of the same opinion that it does have a shrouding effect on the air flowing through the brake drums which would cause an increase of temperature would would reach the point where brake fade would be encountered.

Q. What do you mean by "brake fade," Mr. Dolan?

A. Brake fade is a condition encountered in vehicles braking whereby, when high temperatures are encountered—and by that I mean temperatures in excess of approximately 400 degrees—where the rosin binder which holds the friction material of the brake lining together disintegrates and reduces it, permitting the friction between the brake lining and the brake drum to be reduced. This increases the stopping distance of a vehicle and can reach a condition where you have practically no braking effect whatsoever.

Q. Now, you use the term several times about the shrouding effect caused by the requirements of the attachment [fol. 198] of the contour mudflap. What do you mean by a "shrouding effect"?

A. Well, the law reads that the contour mudflap must be attached to the vehicle so that it is a distance no greater than 6 inches from the surface of the tire. Also, the law states that there will be a flange of at least two inches on each side of the mudflap and thereby has the scoop effect on the air which would normally flow past the brake drum and the wheel and cause almost a dead area in that section.

Q. Now, under the——

Mr. Husted: Just a moment, please. I challenge that testimony. That's been an incorrect statement of the law.

I am not raising this necessarily as an objection, but to get it straightened out.

Judge Briggle: You may do so if you wish on cross examination.

Mr. Husted: Very well. Thank you.

Judge Briggle: Proceed.

By Mr. Steiner:

Q. Now, prior to the enactment of the Statute in question, was there any minimum or maximum distance required to be observed in connection with the placement of the mudflap from the rear wheel of the trailer?

A. No, there was not.

Q. And based upon your engineering and practical experience, what in your opinion was the maximum distance [fol. 199] which should be observed between the wheel and the flap in order to prevent brake fade?

A. On the recommendation of the Society of Automotive Engineers, they state——

Mr. Husted: I object to that. He asked for your opinion.

Judge Briggle: Yes.

The Witness: In my opinion, the mudflap should be placed as far back from the wheel as possible allowed by the construction of the vehicle.

By Mr. Steiner:

Q. Now, in connection with the operation of Burlington Truck Lines, what instructions or what distance was observed by your company and is observed in connection with those vehicles that have the conventional flap on them?

A. We strive to maintain a minimum distance of 12 inches.

Q. Why do you do that?

A. So as to give the greatest possible opportunity for the air to flow through the wheel area and give a greater cooling effect to the brake drums so that between brake applications the temperature of the brake lining and the brake drums will be cooled or reduced as far as possible.

Q. Now, as a member of the Society of Automotive Engineers, and a member of these committees which are mak-

[fol. 200] ing these studies, has the Society put out a handbook in which it has recommendations with respect to the best possible method of applying attachments in order to achieve best possible safety on the highway?

A. Yes, they have.

Q. And when was the date of the latest publication?

A. 1957.

Q. And does the Society of Engineers in its 1957 publication have a portion devoted to recommended practices in order to obtain maximum efficiency and protection with respect to wheel splash and stone throw?

A. Yes, they do.

Mr. Husted: I object to that unless it is shown that this survey or recommendation applies to contour splash guards. We are not concerned with the proper placement of any other kind.

Judge Briggle: Let the answer stand subject to the objection.

By Mr. Steiner:

Q. What recommendation has been made by the Society of Automotive Engineers with respect to wheel splash and stone throw protection?

A. If I may refer to the handbook, I can give it to you directly from the handbook.

Mr. Steiner: If the Court has no objection, or Mr. Husted, we would like to do so.

[fol. 201] Mr. Husted: I have no objection. I have some I would like to submit to the Court later, if Your Honors please, along the same line.

Judge Major: From the same book?

Mr. Husted: Not from the same book.

Mr. Steiner: It's very brief, if the Court please.

Mr. Husted: From an equally authoritative source, Judge Major.

The Witness: It gives a recommendation that the vertical measure from the ground to the bottom edge of the splash guard should not exceed one-third the horizontal distance from the bottom edge to the center line of the axle.

Secondly, it states that the splash and throw limiting part shall extend laterally for at least the width of the tire or tires; and third it states that the splash and throw limiting part shall be as far to the rear from the wheel as practical for greatest efficiency.

By Mr. Steiner:

Q. Has your company installed any contour mudflaps on its vehicles?

A. Yes, we have.

Q. And approximately how many sets have you installed?

A. Approximately 800 sets.

Judge Briggle: Did you say of the contour type?

The Witness: Yes, Your Honor.

[fol. 202] By Mr. Steiner:

Q. And what has been the approximate cost to install a set?

A. They run approximately $30 a set.

Q. How does that compare to installation cost of the old conventional type?

A. Our replacement cost of conventional type is approximately $8 a set.

Q. Now, have you been confronted with problems in connection with the use of the contour flap on the highway?

A. Yes, we have.

Q. And have your problems been the same as the problems which were testified to by other witnesses which preceded you?

A. Generally the same. We have had one mudflap torn completely off as a result of the tire blowing. We have had another one where the mudflap was curled up completely under the trailer from the same effect, and we are daily fixing 20 to 25 trailers throughout the system that have contour mudflaps bent.

Q. Now, in connection with the contour mudflaps, I presume that before you purchase them you likewise invited various manufacturers to come in and present their wares and try and make sales program to you?

A. Either that, or we contacted them, one or the other.

[fol. 203] Q. And has any representation been made to you by the manufacturers of the contour mudflap with respect to the life expectancy of the contour mudflap?

A. Yes, it has.

Q. What representation has been made to you?

Mr. Husted: I object to that as being hearsay.

Mr. Steiner: If the Court please, I think it was made to this gentleman in the ordinary course of business and is very pertinent.

Mr. Husted: But we haven't got him here to cross examine him.

Judge Briggle: Objection sustained.

By Mr. Steiner:

Q. What has been your experience in connection with the life expectancy as such of the contour mudflaps since you have used them?

A. We have used them for approximately four months, and since we are repairing 10 to 20 units a day, and right now it's averaging I think approximately 20 units, that's right, I think that the life expectancy of our contour mudflaps is going to be much shorter than it was with the conventional.

Since November of 1955, we have replaced 157 of the conventional mudflaps, and on the basis of what we are doing now, I expect that in a two-year period that we will have replaced a far greater number of contour mudflaps.

[fol. 204] Q. Mr. Dolan, during your testimony you discussed briefly the question of brake temperature and brake fade. Do you recall that?

A. Yes.

Q. Did you cause to be made and participate in yourself an actual test where a comparison was made of brake temperature when a trailer was equipped with a contour mudflap, and the same trailer was also equipped with the so-called conventional mudflap?

A. Yes, we did.

Q. When did you make this test?

A. On January 9, 1958.

Q. And where did you make this test?

A. On the Congress Street Expressway in Chicago.

Q. And what kind of a vehicle did you use when you made this test?

A. We used a 1957 M- : (sic) model 8653 tandem tractor, and we used a 1957 ground tandem axle trailer.

Q. And was the trailer loaded with a cargo?

A. Yes, it was.

Q. And did you have it loaded within the maximum load limit as prescribed by Illinois Statute?

A. We loaded it to the maximum load limits as allowed by law.

Q. Now, when the truck was driven over the highway, [fol. 205] who was in the cab of the tractor?

A. Our driver, whose name was Fergolli (phonetic), Mr. Robert Dixon, an engineer of the Bendix Products Corporation, and myself.

Q. Now, Mr. Dolan, is there an accepted scientific and accurate way to measure brake temperature?

A. Yes, there is.

Q. And what is the accepted method?

A. The accepted method by engineers is to install a thermocouple in the brake lining on the wheel, connect the thermocouple to a temperature recorder, or to a temperature indicator, rather, by means of two insulated wires whose resistance is carefully calculated, and by this set-up the temperature, during brake applications, or at any time during the operation of the test, the temperature can be definitely and accurately recorded.

Q. And was this the method that you used in making the test that you are going to discuss?

A. Yes, it is.

Q. And what kind or type of make of thermocouple and meter did you use?

A. We used a thermocouple which was made by the Bendix Products Corporation, and we used a temperature indicating device which was also supplied by them.

Q. And were they in good mechanical and working condi- [fol. 206] tion at the time they were installed on your truck?

A. They had been calculated by the Bendix Products the day before we ran the test.

Q. And did you personally supervise the installation of these instruments on the truck?

A. Yes, I did.

Q. And before commencing the test run, did you check and see if the devices were properly working?

A. Yes, they were.

Q. Now, will you tell us, in making your test, how you conducted this test?

A. Well, following the installation of the temperature indicating devices, we entered the Congress Street Expressway—

Q. (Interposing) When you made your first test, did you have a contour flap or a conventional flap, and where was it fixed?

A. We made the first with a contour mudflap affixed behind the right rear wheel of the trailer.

Q. Is that the type and kind as depicted in Exhibit 1 and 2 that the Court has?

A. That is correct. We affixed the contour mudflap on the right rear wheel of the trailer.

Q. And when that was done, what did you do?

A. Then, on to the conduct of the test?

[fol. 207] Q. Yes.

A. We then took the unit on to the Congress Street Expressway in Chicago, entering the Expressway at Des Plaines Street and proceeded westward. The procedure of the test was to accelerate the vehicle to 40 miles an hour, make a full brake application on the trailer brakes, decelerate the unit to 20 miles, release the brakes and again accelerate the unit to 40 miles an hour, making continuous brake applications at approximate intervals of one mile.

Q. Now, as you reached the western end of the Expressway, about how many miles had you traveled?

A. The Congress Street Expressway is approximately five miles in one direction, and we went in a westward direction on the Congress Street Expressway leading in at Laramie Avenue, crossing over to the other side, and proceeding eastward again to Des Plaines Street. We made

that loop twice and made approximately 22 brake applications while the contour mudflap was attached.

Q. Now, as each brake application was made, were you able to determine from the meter in the cab the brake lining temperature of the right rear wheel?

A. From the meter in the cab, we took the brake temperatures just before the application was made, and we took heat temperatures during the application of the brakes.

[fol. 208] Q. For example, now, when you took your first reading, did you record the temperature in the right rear wheel?

A. Yes, we did. And I have my notes here.

Q. And did you likewise also make a chart which would reflect the recordings of the temperature and the differentiations?

A. Yes, we did.

Mr. Steiner: If the Court please, may we have this marked for identification and exhibited somewhere.

By Mr. Steiner:

Q. Mr. Dolan, when you made your first temperature reading, which was prior to the first brake application, what temperature was reflected?

A. May I refer to the notes that I made at the time?

Q. Surely.

A. With the contour mudflaps on, the first temperature made prior to the start of the first application was 100 degrees.

Q. Fahrenheit?

A. Fahrenheit.

Q. Now, did you take a reading with each brake application?

A. Yes, I did.

Q. And for the sake of brevity, for example, just prior to the sixth brake application, what was the reading?

[fol. 209] A. 160 degrees Fahrenheit.

Q. And what was the reading during the application of the brake at the sixth time?

A. 250 degrees Fahrenheit.

Q. Now, just prior to the tenth application, what was the brake reading?

A. 260 degrees Fahrenheit.

Q. And during the tenth brake application, what was the reading?

A. 310 degrees Fahrenheit.

Q. Just prior to the last of the 22 brake applications, what was the reading?

A. 360 degrees Fahrenheit.

Q. And during the 22nd application of the brakes?

A. 400 degrees Fahrenheit.

Q. Now, when you completed two round trips, what did you do?

A. We then took the vehicle to Burlington Truck Lines maintenance shop in Chicago and removed the contour mudflaps and installed the conventional mudflap. We also used that as a lunch period and permitted the brakes to cool so that we would start again with cool brake drums.

Q. And did you go back to the same Congress Street Expressway?

A. Then, we returned to Congress Street Expressway. [fol. 210] We entered at Des Plaines Street and went westward again the five miles to Laramie Avenue, crossed over, went eastward again to Des Plaines Street and used the same procedure of making brake applications and reducing our speed from 40 to 20 miles an hour with those brake applications.

We then re-entered the Congress Street Expressway at Des Plaines Street, intending to go west again, but unfortunately an accident had occurred on the Expressway some distance ahead of us, and it tied traffic up so that we were unable to continue our test after the tenth brake application.

Q. So that with the conventional flap you only made ten applications, is that correct?

A. That's right.

Q. Now, directing your attention to the reading of the brake temperature immediately prior to the first application of the brake, what was the temperature?

A. 60 degrees.

Q. And, incidentally, did you install this conventional flap approximately 12 inches away from the wheel?

A. In this case, we installed it approximately ten inches from the wheel due to the construction of that particular trailer.

Q. And was the contour flap installed in accordance with the requirements of the Statute?

[fol. 211] A. Yes, it was.

Q. Now, after the first brake application, did you take the temperature?

A. Yes, we did.

Q. What was it?

A. The peak temperature during the first?

Q. During the application of the brake itself?

A. On the first application, it was 100 degrees.

Q. And the temperatures are all Fahrenheit?

A. All Fahrenheit.

Q. Now, for the purpose of comparison, did you take the temperature prior to the sixth brake application?

A. Yes, I did.

Q. And what was the recording?

A. 140 degrees Fahrenheit.

Q. Did you also take the temperature during the sixth brake application, and, if so, what was the temperature?

A. It was 240 degrees Fahrenheit.

Q. Did you take the brake temperature just prior to the tenth brake application?

A. 210 degrees Fahrenheit.

Q. And what was the temperature at the tenth brake application?

A. 290 degrees Fahrenheit.

Q. Now, bearing in mind the ten applications, were you [fol. 212] able to come to a conclusion and opinion as to the effect of brake temperature in the use of the contour mudflap as compared with the conventional mudflap?

A. Yes, we did.

Q. And did you prepare a chart which would reflect the differentials and would show the effect of brake temperature?

A. Yes, we did.

Q. I would direct your attention to Exhibit 15, and would you explain to the Court what you did and how you prepared Exhibit 15, for identification?

A. In each case we took the temperature differential from the peak temperature that was reached during the brake application to the number of degrees by which the temperature was reduced just prior to the next application. And by using the two-color scheme on the graph, showing the decline in degrees between brake applications, with the contour mudflap on, we showed that in red, and we showed the decline in the degrees between brake applications with the conventional mudflap on in blue.

Q. All right. And what does Exhibit 15 portray as respects the results of the test made on January 9, 1958?

A. Most important, it shows that as the temperature increases in the brake area, that the cooling effect with the conventional mudflap on is far greater than it is when [fol. 213] the contour mudflap is installed.

Q. What importance, if any, does that have with respect to the safety of the operation of the vehicle on the highway?

A. It is of particular importance because once we get into the area of brake fade, as we did when we were running the tests, when we reached a temperature of approximately 400 degrees, it is entirely possible that brake fade would be encountered. As soon as that happens, it can develop without the driver's knowledge. He makes one brake application, and he has brakes; on the next brake application he makes, he sets his brakes, he encounters brake fade, his stopping distance is increased, and he may well be involved in a serious accident, or he may find himself in a condition where he has no practical braking effect whatsoever.

Q. Now, so as I understand Exhibit 15 correctly, for example, No. 9 reflects the ninth brake application, or the period in between?

A. It reflects the period between the ninth and tenth, from the ninth peak to the temperature just before the tenth brake application was made.

Q. Now, as I understand it, then, in connection with the

t[illegible]f contour mudflaps, the temperature cooled off only 40 degrees between applications?

[fol. 214] A. That is correct.

Q. While with the conventional mudflap, as we use the term here, there was a cooling of 80 degrees?

A. That is correct.

Q. And as I understand it, that is of significant importance with respect to the safe operation of that vehicle on the highway?

A. That is correct, because the greater cooling effect that can be achieved on the brake drums, the lower the temperature will be during any one brake application.

Q. Now, based upon your experience, would you state whether or not the brake cooling temperatures which have been reflected here on Exhibit 15, with the conventional mudflap, is the normal type of a cooling which is ordinarily achieved? Do I make myself clear?

In other words, this is an unusual situation you have portrayed here on Exhibit 15, or is this normal?

A. This is quite normal. As a matter of fact, there are many cases in which heavier brake service will be encountered than this. We operated in ambient temperatures of 34 degrees when we were testing the contour mudflaps, and 38 degrees when we were testing the conventional mudflaps. But, when you get into areas that operate at 100 and 120 degrees temperatures, then it becomes all important to obtain the maximum possible cooling effect.

[fol. 215] Q. Now, would you state that the test confirms your previous opinion which you gave earlier to the Court with respect to brake fade?

Mr. Husted: I object. That is up to the Court to determine.

Judge Briggle: Objection sustained.

By Mr. Steiner:

Q. What was the condition of the highway at the time, that is, what were the weather conditions at the time the tests were made?

A. The weather condition was excellent. It was clear, and the highway was dry.

Q. And I think you indicated that when you started the test, the temperature was 34 degrees?

A. That is correct, with the contour mudflap.

Q. And what time of day or night was that?

A. Approximately 12:30 P. M.

Q. And when you started your test with the conventional flap, what time of the day or night was it?

A. It was 2:45.

Q. You said the temperature was 38 degrees?

A. The temperature was 38 degrees.

Q. And did you make your temperature comparison with the same thermometer?

A. Yes, we did.

Q. Now, did you hear the testimony of Mr. Hayes this [fol. 216] morning with respect to the blow out that he had, which in his opinion, caused the contour mudflap to be disengaged from the trailer?

A. Yes, I did.

Q. Have you an opinion as to whether or not, based upon your experience and study, that this is the fact?

A. We have had the same thing happen on our trailers when the tire blows out. When that happens, it causes the tread or the rubber which is bonded to the fabric of the tire to separate and flop loose, and it is this flopping piece of rubber which catches the contour mudflap and tears it off.

Q. Have you experienced such problem with the use of conventional mudflaps?

A. No.

Mr. Steiner: You may cross examine, and I will offer Exhibit 15 in evidence, if the Court please.

Judge Briggle: Any objection to 15?

Mr. Husted: Yes. I'd like to cross examine first before you rule on that.

Judge Briggle: You may proceed.

Cross examination.

By Mr. Husted:

Q. Now, this test that you conducted, Mr. Dolan, were [fol. 217] both of those tests conducted with the same truck?

A. Yes.

Q. With the same truck?

A. Yes.

Q. And on the same day?

A. Yes.

Q. And on both tests, was the truck loaded to maximum capacity?

A. Yes, it was.

Q. And was it at the time it was loaded to maximum capacity, referring to the contour splash guard test, was it at a spacing of 6 inches from the wheel or the surface of the tire?

A. Yes, it was.

Q. And did the contour splash guard that you used have a flap on it that reached within, at least within ten inches of the ground?

A. Yes, it did.

Q. And did it have a lip or a flange on both sides of the contour splash guards?

A. Yes, it did.

Mr. Husted: I challenge the accuracy of the test, Your Honors. The splash guard that Mr. Dolan used did not meet the specifications of the Illinois Statute. There is no prescription in the Illinois Statute for a flange on the in- [fol. 218] side of the splash guard, only on the outside. That would tend to give it a cup effect which the law does not require.

Judge Briggle: Did you say they had flanges on the inside?

The Witness: They had flanges on both sides, Your Honor.

Judge Briggle: Is that all the questions?

Mr. Husted: No. I'd like a ruling on that.

Judge Briggle: Well, there is nothing to rule on now. It's a matter of credibility of the witness, of course. The suggestion was made as a matter of credibility of the witness.

Mr. Husted: I see. Well, I am challenging the results of his test, too. It was made with something other than a splash guard specified by the act. I don't see what materiality that would have. I respectfully urge the Court.

Mr. Steiner: Since it's the same type and kind in Exhibit 2, which was sold to him by somebody representing to him that this was the type and kind prescribed by the Statute——

The Witness: The mudflap we used has the approval of the Department of Safety of the State of Illinois.

Mr. Husted: That has nothing to do with it. The kind of splash guard in issue is the one specified by the legisla-
[fol. 219] ture.

Judge Briggle: Does the Statute say with the flange only on the outside?

Mr. Husted: Only on the outside, Your Honor. Someone might conduct some tests with a nine inch flange instead of a two inch flange, and those tests might bear some criticism of the Statute. We are only concerned with a test of a splash guard that would meet the specifications.

Judge Briggle: I thought you both agreed that these photographs correctly represented the splash guard in question.

Mr. Axelrod: They are.

Mr. Husted: They are contour. We didn't measure the lips. Do those pictures show a flange on the inside?

Judge Briggle: I guess that does, unless I have got it upside down.

Mr. Steiner: Are you using the term "inside" differently from Mr. Husted?

Mr. Husted: That splash guard there won't meet the specifications. Let me make myself clear, Judge Briggle. I don't want to get anyone confused. I wouldn't say it doesn't meet. I would say that it exceeds the specifications; it exceeds the specifications.

Mr. Steiner: The Statute doesn't say you can't have an inside flange; it says you must have one on the outside
[fol. 220] edge. It doesn't say you can't have an inside one.

Mr. Husted: But you have conducted a test with one that exceeded, made more of a cup effect. This thing is flanged or cupped only on the outside. Then, they come on with heat tests which are inside on the brake drum, and they have used one that cups there, too. That certainly shouldn't be.

Mr. Steiner: Somebody is selling them contrary to specifications of the Statute.

Mr. Husted: That may very well be, but that doesn't change the Statute.

Judge Briggle: Your objection goes to Exhibit 15?

Mr. Husted: That's right.

Judge Briggle: Exhibit 15 will be received subject to objection, and we will consider it.

(Whereupon, Plaintiffs' Exhibit No. 15 was received in evidence.)

By Mr. Husted:

Q. Mr. Dolan, the highest heat, according to your thermocouple, in the test that you conducted was 400 degrees, was it not?

A. That's correct.

Q. And that was on the right wheel, was it not?

A. That's correct.

Q. And does not the right wheel have a tendency to develop a greater brake heat than the left because on a [fol. 221] normal highway it is a little lower in elevation if it's a crowned highway? Is that not correct?

A. I have never heard that suggestion made in any of the brake discussions that I have ever heard.

Q. I see. Now, in your opinion, is 400 degrees, 400 degree heat in the brake, is that within the brake drum that this heat is generated?

A. Yes, sir.

Q. Is that such a heat as is dangerous to the operation of the vehicle?

A. Not only is it in my opinion, but tests made by various brake lining manufacturers.

Mr. Husted: I object to that. I think you are confined to your own opinion, sir.

The Witness: In my opinion, drawn from tests made by various test brake manufacturers, and information they have submitted to me, it is getting definitely into the brake fade range.

By Mr. Husted:

Q. As a matter of practical fact, though, Mr. Dolan, is it not true that brake temperatures in ordinary operation frequently run up to 1,500-1,600?

A. That is only a surface temperature and is instantaneous.

Q. But it does go that high?

A. Only at the surface.

[fol. 222] Q. Where did you take your tests?

A. Our thermocouple was inserted from the bottom of the brake lining so as to record temperatures not only at the surface, but residual temperatures within the brake lining after the application is made.

Q. Now, on an ordinary test, is the heat greater on the surface than on the inside?

A. Well, surface temperatures are always greater.

Q. And do you have any way of estimating how much greater? For instance, you have got an inside temperature of 400. What in your best estimate would you say the surface temperature would be?

A. As you stated there, with a like temperature of 400 degrees, instantaneous surface temperatures of 1,600 degrees are encountered frequently.

Q. And are you telling this Court that this contour splash guard would cause a surface temperature of 1,500 to 1,600 degrees under ordinary operating conditions?

A. The surface temperature of 1,600 or 1,800 degrees can be encountered under any conditions.

Q. With or without splash guards, isn't that correct?

A. It is only an instantaneous temperature and is not important in the entire consideration of braking effect.

Q. And cannot that temperature be encountered and developed whether there are either or no splash guards, [fol. 223] either type or no?

A. Yes.

Q. I see. And could not that same thing be said of all your tests, any of these temperatures could have been encountered with or without splash guards; isn't that correct?

A. Not any of the temperatures, no. The important, and by far the most important temperature is the cooling effect to which the brake drum can be reduced prior to the next brake application.

Q. What causes the brake drum to be cooled?

A. The airflow over the drum.

Q. And is it your contention that this splash guard reduces the airflow over the drum?

A. Yes, it is.

Q. How far away from the drum is the splash guard?

A. The splash guard is 6 inches from the surface of the tire.

Q. And how far is it from the surface of the drum?

A. That will vary depending on the tire size, but I would say approximately 8 inches. But, due to the construction of the tire and wheel, your airflow must follow to a degree, not immediately, but to a degree the contour of the wheel and the tire.

Q. Now, isn't it true that the contour splash guards [fol. 224] specified by the Illinois Statute are open at the front, that is, they are cupped? If the wheel were a round wheel, there is nothing obstructing this area here, is there?

A. That is correct.

Q. And is it not true that the forward motion of the truck causes an air current between the tire and the brake drum on the bottom or inside and the contour splash guard on the outside, or on the top?

A. There is certainly some airflow. That is correct. And, in fact, it may be that airflow that has the greatest effect in causing the dead area space in the brake drum itself.

Q. Have you ever seen a contour splash guard ostensibly, at least, manufactured to comply with the Illinois Statute which contoured the brake drum?

A. Well, if it contours the wheel, it contours the brake drum.

Q. Well, is the brake drum inside the wheel or inside the lining?

A. Yes, the brake drum is inside the wheel.

Q. If you were to drop a perpendicular line on the inside of the tire from the top of the tire to the bottom resting on the road, on which side of that line would the brake drum be?

A. The perpendicular line from where, now?

[fol. 225] Q. From the top of the inside of the wheel or tire?

A. Longitudinally or laterally?

Q. Longitudinally.

A. The face of the brake drum, let's see, that center line would come maybe two thirds or three quarters inside the brake drum.

Q. So, part or some of the brake drum would be outside the contour of the splash guard, is that correct?

A. No.

Q. It would all be inside?

A. You are talking about a center line on the tire, is what you said, didn't you?

Q. No. I am talking about a line from the inside-most portion.

A. Inside surface.

Q. Inside surface of the inside tire if you have dual wheels, dual tires?

A. There would be very little of the brake drum protrude; in some cases, none.

Q. I see. And the brake lining, of course, is inside the brake drum?

A. That is correct.

Mr. Husted: I think that is all, Mr. Dolan.

Mr. Steiner: Might I ask just a few questions.

[fol. 226] Redirect examination.

By Mr. Steiner:

Q. You have stated several times that the outside surface temperature is not important. Will you tell us why?

A. Well, the surface temperature, when it achieves these to the very high degree that it does, does not penetrate the lining sufficiently so that it has a disintegrating effect on the lining.

Q. The contour mudflap, which is affixed on the trailer that you made the test that you have described in Exhibit 15, is that the type and kind that you have fixed on all your equipment?

A. Yes, it is.

Mr. Husted: I object to that as being immaterial, insofar as my objection to the exhibit is concerned.

Judge Briggle: Let it stand.

By Mr. Steiner:

Q. And to the best of your knowledge, does it meet the requirements of the State of Illinois Statute?

A. It does.

Mr. Husted: I object. He's already admitted that it didn't.

The Witness: It has been approved by the Department [fol. 227] of Public Safety.

By Mr. Steiner:

Q. Did you submit it for approval before you purchased it and affixed them on the trailer?

A. The manufacturer did and advertised it as being such, and his advertisement was substantially by the Central Motor Freight Association.

Mr. Husted: I object to all of this latter question and answer, if Your Honors please. I don't want to try the patience of the Court. I am afraid perhaps I am. The witness has admitted that this has some extra specification or lips that the law does not require.

It's wholly immaterial whether the Department of Public Safety would adopt them or not. Normally, the Department of Public Safety will permit an exceeding of the specifications in the interest of safety. But, to use something that goes far and beyond what the law says as a test to say that the law won't work is not competent, and that is what these Plaintiffs have used. They have used something that is contoured on the inside as well as the outside, and that is the very spot, as Mr. Dolan showed on

his testimony, where the brake drum is, just barely inside; in some cases a little protruding.

Judge Briggle: Some employee of the state can't change the law. That's obvious.

Mr. Husted: I think we can all agree to that, Judge. I [fol. 228] don't think even Mr. Axelrod would seriously dispute that.

Judge Briggle: If the Statute provides something, and somebody in a department says you can do it another way, of course, we are bound by what the Statute says. That affects the credibility of Exhibit 15, and will be so considered. It has been received subject to the objection. Is that all of this witness?

Mr. Axelrod: That's all of this witness, Your Honors.

(Witness excused.)

Judge Briggle: Call your next.

Fred Johnson called as a witness by and on behalf of the Plaintiffs herein, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Steiner:

Q. Will you state your name and address, please?

A. Fred Johnson. I live in LaGrange, Illinois.

Q. And what is your business or occupation?

A. I am operations manager for Cooper-Jarrett, Incorporated.

Q. Is that a motor carrier operating in Interstate Commerce?

[fol. 229] A. Yes.

Q. By motor vehicles?

A. Yes.

Q. And is the Cooper-Jarrett, Inc., the same company that employs Mr. George Hayes who testified previously here today?

A. That is correct.

Q. What is your position with that company, sir?

A. Operations manager.

Q. How long have you been with that company?

A. 12 years; 7 years in my present capacity, and 5 years as assistant to the operations manager.

Q. What do your duties consist of?

A. I have supervision of our over-the-road operation which entails keeping our schedules operating on time, and in this connection I supervise the maintenance of our equipment and also make recommendations to our Board of Directors for procurement of equipment, if they want recommendations and specifications, and various things such as that.

Q. And as such do you then have jurisdiction over all of the rolling stock of the company?

A. Yes.

Q. And among other things, have you engaged in the examination and purchase of the contour mudflap we have been talking about here today?

[fol. 230] A. Yes, sir.

Q. About how many sets of these flaps have been purchased by your company?

A. Well, we have purchased approximately 139 sets. We got 85 from original trailer manufacturers, and that would be about 54 that we have installed ourselves that we bought from suppliers.

Q. And did it cost you, as previously testified by other witnesses, about $30 to install these?

A. That is correct.

Q. Now, over and above the purchase price of the contour mudflaps, can you tell us what it cost you to make an installation of mudflaps?

A. Well, the figures, as I understand the question, the labor cost?

Q. The labor cost, yes.

A. Approximately $12.

Q. And how long does it take normally to install a contour mudflap?

A. Between three and four hours.

Q. Now, has your experiences in the use of these contour mudflaps been similar to the previous witnesses who

testified, that is, have you had the same experience of them coming off and becoming damaged and so on?

A. Yes, sir.

[fol. 231] Q. And as a result of that experience, what if anything has your company been compelled to do?

A. Well, in attempting to abide by this law, and of our equipment equipped with the contour flaps by the January 1st deadline, we had to hire an extra mechanic in October to try to meet this deadline. The maintenance problem of the ones that we already had installed was becoming such a large problem that our normal force just couldn't handle it.

Q. In other words, you have one man now that does nothing but install and repair and replace contour mudflaps when they come off, is that right?

A. That is all he does in addition to the other mechanics.

Q. What do you have to pay that man?

A. Well, he makes approximately $5,500 a year.

Q. Now, based upon your past experience, do you have an estimated figure or anticipation of what it would cost your company to maintain your fleet with contour mudflaps over a period of a year?

A. Yes.

Q. What is that?

A. Well, I have——

Mr. Husted: If Your Honors please, I would like to object to that. This witness has indicated some experience. [fol. 232] He doesn't have to testify in terms of speculation and conjecture. He can testify from experience.

Mr. Steiner: All right.

Q. Give us what it has cost you to date, and project it out.

A. Well, I have compiled some figures.

Q. Tell us what they are then, please.

A. We have replaced or have damaged flaps still in service that need replacing, at least 50 per cent of this 139 that I mentioned.

Q. That is since October of 1957?

A. 1956.

Q. 1956?

A. We started a few at that time, but the majority have been installed after that time.

Q. Did you have that problem in connection with the use of the conventional mudflap?

A. No, sir.

Q. Approximately how many trailers does your company normally operate?

A. We have 350 trailers.

Q. And as I understand it, since you have acquired these, approximately 50 per cent of them have had to be replaced or repaired, or in the process of being replaced or repaired, is that correct?

[fol. 233] A. That is correct.

Q. Do you have any opinion as to what is the cause of the fact that you are called upon to continue to replace and repair these contour mudflaps?

A. Well, we have had the same experience as some of the other witnesses have testified, that it's——

Mr. Husted: I object to that. We don't know what he is talking about.

By Mr. Steiner:

Q. Well, then, tell him.

A. The experience we have had is that it's difficult to mount this flap, being of a rigid construction, where it will stand up under road surface and backing into docks. You get a lot of damage to the contour flap that you did not get with the conventional flap, and you have all sorts of maintenance problems come up with this rigid type of flap which, as I said, is not as convenient as the conventional flap.

Q. Has there been any problem with the accumulation of ice and snow in the contour flap?

A. Yes.

Q. What has that problem been?

A. Well, with this small area, and being of a curved surface, the ice and snow that collects in there tends to make a heavy weight. The flap is heavy to start with, and the accumulation of snow is, then, you get a certain amount

[fol. 234] of vibration, and you perhaps would lose the flap. You could lose it entirely.

Q. Would an accumulation of ice and snow being caught between the wheel and the contour flap have any affect (sic) on the heat of the brake lining and affect brake fade?

A. I would say yes.

Q. Now, did you have that problem, that is, the problem of accumulation of ice and snow with the conventional flap?

A. No, sir.

Q. Why not?

A. Well, the conventional flap, being made of a flexible material and hanging in a perpendicular position to the trailer, would shake off any accumulation of ice or snow.

Q. Do you attempt to mount your contour flaps in the same manner that Mr. Gaughen testified to this morning?

A. Yes, sir. That is the only practical way we have had.

Q. Have you had the same problems he has had?

A. Yes, sir.

Q. Now, did you examine the contour mudflaps that Mr. Hayes talked about this morning?

A. Yes, sir.

Q. And did you have an opinion as to what caused them [fol. 235] to become disengaged from the trailer?

A. Yes, sir.

Q. What in your opinion caused that?

A. The tread of the recap became separated from the carcass of the tire and wrapped itself around the flap, pulling it loose from the trailer.

Q. Have you ever had such an experience before in the use of the conventional mudflap?

A. No, sir.

Q. Now, have you examined or observed to determine what affect, (sic) if any, the contour mudflap has on side splash in connection with operations on the highway?

A. Yes.

Q. And what have you observed, and what in your opinion has the effect and result, and particularly insofar as the result affects safety?

A. Well, I believe, and from personal observation, I have noticed that trailers equipped with contour flaps will have a greater concentration of side spray as the vehicle is

going down the highway and then is a definite hazard for either oncoming traffic meeting something putting out a lot of side spray, or, in attempting to pass the vehicle, putting out a lot of side spray, and I think it is much more pronounced in trailers equipped with this contour flap.

Q. Based upon your experience in the use of contour [fol. 236] mudflaps, do you believe that there are any other hazards which have been encountered which in your opinion have a serious affect (sic) upon the safety of operation upon the highway?

A. Yes.

Q. What are those other hazards?

A. Well, the flap itself, contour flap breaking off of a trailer, which can happen, would present an obstacle on the highway that could cause a serious accident. The creation of the spray is another safety factor that I have already mentioned.

Q. And do you subscribe to Mr. Dolan's theory in connection with brake fade as being created causing an additional hazard?

A. Yes, sir. If a vehicle is operating without full braking power, why, it could be a safety factor, very definitely.

Mr. Steiner: You may cross examine.

Judge Briggle: You may cross examine.

Cross examination.

By Mr. Husted:

Q. Would you explain to the Court, Mr. Johnson, how these contour splash guards are responsible for brake heat on the one hand and freeze-up on the other within the steel [fol. 237] or flexible material fender?

A. Well, the accumulation of ice. If you are traveling on a road that is wet, you are going to be constantly picking up this water, and if you had a cake of ice and were running something hot over it, you would just continuously melt that surface that the hot portion was touching.

Q. You are talking about the tire? The tire is the only portion that is hot, isn't it?

A. Yes. But as the tire melts a portion of the ice, well, it's also picking up water and making more ice. So, it

could remain constant unless you parked the vehicle. Then, it would perhaps melt.

Q. This collecting of material freezes then against the fender, is that correct?

A. Yes.

Q. Well, why doesn't the heat that is generated in this area that you have been talking about, why wouldn't it melt that off?

A. Because you are picking up water constantly that is refreezing. It's hitting the ice, so it's manufacturing ice, so to speak, and it melts it as fast as it picks it up.

Q. You say then that the heat from the tires is not conveyed to the splash guard, is that correct?

A. Well, in this specific example that you are posing.

[fol. 238] Q. I am not posing any example.

A. Well, you are stating in the case of forming ice.

Q. All right. Mr. Johnson, I want you to explain, if you will, how these splash guards can cause brake heat and freeze-up at the same time?

A. Well, if you are confining this heat within this area that is 6 inches between the tire and the flap, if you are confining it between the wall of ice and the tire, or between the contour flap and the tire, you are still confining the heat.

Q. Well, now, where was this packed ice and snow that you are talking about, if it isn't in that same space?

A. I say that it's confined in that space.

Q. Are you talking now about the heat or the ice?

A. You can confine heat.

Q. You are talking about the heat?

Mr. Steiner: I would suggest that Mr. Husted let the witness finish one answer, and I think we could get to the bottom of this.

Judge Briggle: I think we have reached the bottom. Is that all of this man?

Mr. Husted: I think so.

Judge Briggle: All right.

(Witness excused.)

[fol. 239] Mr. Axelrod: If the Court please, could we take a five minute recess? I think we could get a stipulation

on the other Plaintiff, and we may have a short witness or not.

Judge Briggle: Ten minute recess.

(Whereupon, a short recess was had)

STIPULATION AS TO EXHIBITS

Mr. Axelrod: May it please the Court, by stipulation with Mr. Husted, I have asked the Clerk to mark for identification as Exhibit No. 16 a Pacific Intermountain Express Shippers Guide; as Exhibit No. 17, Pacific Intermountain Express trailer interchange guide. Both 16 and 17 are somewhat self-explanatory. A witness, John Scheele, is here representing the Pacific Intermountain Express Company, and, if called to the stand, he would testify with respect to Exhibits 16 and 17 in the same manner as witness Crosby did on behalf of Watson Bros., and also Witness Blohm of the Denver-Chicago Trucking Company. Is that agreeable, Mr. Husted?

Mr. Husted: Yes, yes.

Mr. Axelrod: There is also marked for identification as Exhibits 18 and 19 a map showing the operations of Navajo Freight Lines and also the Exhibit 19, which shows the names of carriers with whom the Navajo Company interchanges. A witness, William Carpenter, is here available, and, if called to the stand, he would testify similarly [fol. 240] to witnesses Crosby and Blohm on behalf of Watson and Denver-Chicago Trucking Company. Is that agreeable?

Mr. Husted: Now, as I understand that, this is just as to the nature and background of their operations?

Mr. Axelrod: That is correct.

Mr. Husted: Not talking about the technical objections to the particular splash guard?

Mr. Axelrod: That is correct. They would testify in support of complaint in respect to their operation.

Mr. Husted: That is perfectly all right.

Mr. Axelrod: And lastly, Exhibit No. 20, which is a map on one side and the list of points on the other showing the kind of operation of Ringsby Truck Lines, Inc., and a witness, Charles Riordan, on behalf of Ringsby Truck

Lines, is here and would testify if called just the same as witnesses Crosby and Blohm.

Judge Briggle: Very well. Exhibits 16, 17, 18, 19 and 20 will be received under the stipulation.

(Whereupon, Plaintiffs' Exhibits Nos. 16, 17, 18, 19 and 20 were received in evidence.)

Mr. Axelrod: If the Court please, that completes the case for Plaintiffs on direct.

Judge Briggle: Plaintiffs rest. Proceed for Defendant.

MOTION TO DISMISS ACTION AND DENIAL THEREOF

Mr. Husted: If Your Honors please, at this time De-
[fol. 241] fendant would like to present a motion to dismiss at the close of the Plaintiffs' evidence, in accordance with Section 41(b) of the Federal Rules of Civil Procedure, which alleges that (a) I move to dismiss this action upon the ground and upon the facts of the law that the Plaintiff and Intervenor show no right to relief. As Your Honors know, this is a motion that is tantamount to a motion for directed verdict in a jury trial.

Judge Briggle: Well, I suppose you generally know what the ruling will be, too, don't you?

Mr. Husted: I hope I don't, Your Honor. I have what I think is a very logical argument in support of that motion.

Judge Briggle: If Your Motion is denied, do you wish to produce some evidence?

Mr. Husted: Oh, yes.

Judge Briggle: Well, that is what I meant.

Mr. Husted: Yes.

Judge Briggle: Well, then, we will hear your evidence. Motion is denied.

I thought, Mr. Husted, you were standing on the questions of law that are raised in connection with this that we would hear your argument now, but we will hear your evidence.

Mr. Husted: The difficulty, of course, is that the motion isn't expressive of exactly what they are. I would have
[fol. 242] to present that in argument.

Judge Briggle: Very well. Go ahead with your evidence.
Mr. Husted: Mr. Eaves, will you take the stand, please.

WILLIAM C. EAVES called as a witness by and in behalf of the Defendants herein, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Husted:

Q. Will you state your name, please?
A. William C. Eaves.
Q. Where do you live, Mr. Eaves?
A. 6030 Sheridan Road, Chicago, Illinois.
Q. How long have you lived there?
A. Two years.
Q. What business or occupation are you engaged in?
A. Manufacturing and developing of contour truck guards.
Q. How long have you been engaged in that business?
A. Approximately six years.
Q. In relation to your background, Mr. Eaves, did you attend an engineering college somewhere?
[fol. 243] A. Yes, sir.
Q. Where was that?
A. University of Montana.
Q. Did you graduate from that school?
A. Yes, sir.
Q. Civil engineer?
A. Yes, sir.
Q. When was that?
A. 1919.
Q. And since that time, briefly relate to the Court what your experience has been in this field, in the engineer field?
A. For the last 30 years I have been affiliated primarily with the automotive industry in developing, engineering, production and operation. I have operated both production activities for parts accessories. I have been designer of air compressors, gasoline engines. I have approximately 40

issued patents; probably 8 or 10 more in the making, which are many of them automotive, some of them electronic.

During the war, the recent war, I operated my own division of the Bendix Westinghouse of the automotive brakes at Erie, Ohio in 1941 to 1944.

After that, I developed quite a large amount of automotive equipment of a special type for the Mexican government [fol. 244] and/or the Venezuelan government. That equipment was in the form of special constructed truck equipment.

After that, I was attached with the Garwood Industries, another automotive organization, primarily in the developing of this particular type of a guard for trucks. I left that connection in 1954-55, and since then have been operating a definite organization in this respect.

Q. Are you a member of any professional engineering societies or organizations?

A. Yes, sir; Society of Automotive Engineers, SAE, so-called.

Q. How long have you been a member of that organization?

A. 6 to 7 years.

Q. Now, what are your duties in respect to this present business that you have testified you are engaged in?

A. Well, I am the chief engineer and general manager of the organization. My duties have been to see that the equipment that was being offered to the public had the proper engineering design, to operate field tests and to supervise the conducting of any and all types of tests that were pertinent to the development, the use and the application of contour type guards.

Q. You have a very real interest then, not only in this [fol. 245] guard, but in the outcome of this case; is that correct, Mr. Eaves?

A. Yes, sir.

Q. How many different varieties of the contour splash guard does your company presently manufacture?

A. In physical construction, three different types. We make an all metal unit, which is the type that has been under most general discussion this morning. We make an all rubber unit, which is the same consistency type of material,

weight and etc., as your standard, orthodox or apron type guards; and we make a third type unit that has a metal center, metal section down the center and an 8 inch soft molded rubber side on each side to protect from sideswiping and bending the metal from the tips and construction of some kind backed into.

Q. Will you describe to the Court the kind of attachments or various kinds of attachments that your guards have to fit the various types of truck bodies and beds?

A. Well, we have approximately three or four standard attaching bracket packages, and from these three or four there are probably a dozen different combinations which can be built up or used. There is a type where we suspend them with small, flat straps on I bolts where they can swing perfectly free.

[fol. 246] There is another type where you have a rigid type mounting where the unit is either bolted or welded direct to the truck body or chassis, wherever the proper place may be on the top end, and the bottom end suspended by a perpendicular type rod.

We have a perpendicular type for the so-called sliding tandem where we use a standard cross tubing or cross bar, something similar to what was shown on some of these exhibits this morning, except that we carry a further bracketing operation from that bar, cross bar to the top section of the fender so we eliminate a good deal of vibration that takes place on metal type construction.

Then, we have had specialized types of packages where the fenders can be hinged on the top or in the center, and the bottom evenly suspended by chains so that if it's necessary for any purpose to get them up out of the way, they can be raised up and hooked so they are above the road or axle line of truck to avoid obstructions that are high.

Q. What type of truck would those be used on primarily?

A. Well, those are developed primarily for various type of dump trucks and vehicles where they had a good deal of trouble due to backing into solid dumps or unloading rock or tipping the whole vehicle up on the back end to unload whatever the contents of body was.

[fol. 247] Q. Now, in reference to sliding tandems, has it been your experience in the years that you have dealt with

these contour splash guards and have sold them that they can be properly attached to a sliding tandem?

A. Yes, sir. We have never had any trouble as an engineering organization in attaching any type of a contour guide to a sliding tandem.

There are some trailers that have a slightly different construction on the back end of the portion of the wheel carriage that slides where some slight change is required, but the basic method of installation has been the same, and we have installed a good many and know quite a number of sets that are installed and are operating satisfactorily and have been for as long as two and three years.

Q. Have you heard the testimony submitted by the various witnesses of the Plaintiffs to the effect that these contour guards have a tendency to generate excess heat?

A. Yes, sir.

Q. Inside the guard?

A. Yes, sir.

Q. As an engineer, will you please give your reaction to that testimony to this Court?

A. I presume I can only answer that by explaining what my own experience and tests have been in connection [fol. 248] with that particular phase of this complaint.

From purely engineering or technical standpoint, it must be realized—which none of the testimony brought out this morning did—that a truck moving forward, the actual airflow or the portion of the truck puts the air across the wheel or is disturbed by the entire body. Some of these trucks are 40 feet long, 45 feet long. They are 8 feet wide. If that truck moves forward at anywhere from 40 to 45 miles an hour, the movement of air pressure or amount of air thrust that is made under and across and for the full width of the truck on the outside of the tire is very great.

That tremendous amount of air moves under that truck. I think there is nobody that has passed a truck or had trucks passing them in the opposite direction that has not been swayed by the air which was evident as it moved by the whole body.

When that amount of air is moved under the truck and directed by an enclosure that is over the wheels, the only thing that can happen is that a draft is definitely and ab-

solutely formed down through that particular opening, which is between the enclosure and the wheel.

In the instance of contour guards, there is more airflow and dissipation of air from over the top of the tire and around the tires than there is actually in a fully open [fol. 249] wheel, because it is directed and guided down there to the amount that is capable of being controlled by the sides of the material or the cover that is over the top of those wheels.

When those wheels are wide open, the only thing that goes across them is the air they hit directly forward as it goes across the side of the tire. The largest tire may have an 8 inch tread and a three or four inch opening between the wheels and another 8 inch tread.

So, an open tread, you have probably 14 to 16 inch opening, at any rate, across the top of those wheels, and that is the only dissipating area of air that is present to flow across the top of those units.

When you put a guard over the top of those, you have a solid area for as broad as 24 inches clear across that and to cap the entire amount of air over a 24 inch area which is being built up into a draft rather than the amount of air over two 8 inch tires, but just to appreciate or to benefit by the flow of air and atmospheric pressure over the tires themselves.

As a consequence, the amount of air that is moved over those tires is several times as great if you put any kind of a cover on. I think another witness to that, or a condition that is very usually seen is the fact that practically all buses have completely enclosed housings, the wheels [fol. 250] are set clear up into the buses. They have no ventilation from the front.

The only ventilation they have is from the side and from under the bus, and those buses are much lower from the ground, less clearance than any kind of a trailer, and yet, by actual analysis and actual information which we have received from several of the tire manufacturers——

Mr. Axelrod: If the Court please, this is going much beyond the scope of the question and is objectionable as being hearsay testimony.

Judge Briggle: I think you may complete your answe.

The Witness: Given the same size tire, the same weight on that tire—I am speaking about a bus—and the same speed of travel that is experienced by that same tire and the same load carrying on a trailer, th mortality on bus tires of that type is no greater, if as great, as the mortality on open truck tires, and yet those tires are completely enclosed, and if you will look at the Greyhound buses, you will find that they are enclosed clear down below the axle line, not only from the front to top to obtain front draft, but clear over the back where the contour guard does not close off the front, and you have the whole open reflection or deflection of the underside of the whole trailer to feed a draft under those contour guards.

By Mr. Husted:

Q. What various methods of attachment do you have for [fol. 251] the splash guards that are manufactured by your company, Mr. Eaves?

A. For all types of different attachments?

Q. Well, briefly enumerate. First, do you have any weld-on guards?

A. That is optional with the installer. While our units are made to be used without welding, all of our kits come equipped with a full contingent of bolts, nuts and washers to bolt them in place. They can be welded if they wish to, and very often, in fact I would say that 9 times out of 10, the consumers do not take standard bracket assemblies from the manufacturer. They chose to make their own.

Q. Have you had any complaints on the splash guards that you have sold, the contour splash guards, from your customers, concerning freezing of ice and snow within the contour fender?

A. No, sir, quite the opposite. We have had testimony from quite a number of other——

Q. (Interposing) Well, wait just a minute, Mr. Eaves. Would you say, Mr. Eaves, that your replacement sales indicate a high mortality on these splash guards that you sell?

A. No, sir.

Mr. Axelrod: That is objected to, if the Court please, [fol. 252] unless the question is specific. I think to be of value to this Court, we would have to have some specific information. Lack of foundation; this is pure conclusion.

Judge Briggle: I don't think he has said yet, at least I have not understood him to say, that he has manufactured the type proposed by this Illinois Statute.

By Mr. Husted:

Q. Do the various type of contour guards that you manufacture comply with the Illinois Statute?

A. Yes, sir.

Q. Are they made primarily with the intent and purpose that they would comply with the Illinois Statute?

A. Yes, sir.

Q. And to be sold primarily in Illinois?

A. Yes, sir.

Q. And do you have a replacement guard business?

A. We have a repeat order business.

Q. That is what I am getting at.

A. Yes, sir.

Q. How many of these units have you sold to your various customers in the past two years, if you know?

A. My company has sold somewhere in the neighborhood of 10,000 units.

Q. Do you have any records or any information as to the replacement orders of those particular customers?

A. A replacement or repeat? Do you want the replace- [fol. 253] ment orders or repeat?

Q. Replacement orders, first?

A. Well, replacement orders have been very few. We have never had enough complaint from the standpoint of replacement due to mortality directed to the company to have thought it necessary to keep any kind of record on it. I could count them on the fingers of my two hands easily.

Q. Have you enjoyed a repeat business, repeat order business?

A. Very much, sir.

Q. Now, do the rubber units which you have have a steel frame or some steel bolstering within the rubber or attached to it in some way?

A. No, sir, except for suspending them or holding them to the vehicle itself.

Q. Are you able to install a rubber unit, a flexible unit that will maintain the relative contour feature in operation?

A. Yes, sir; yes, sir.

Q. How many brackets would you say are put on those type? Describe to the Court how those are bracketed onto the truck?

A. We have only installed some 500 pair of these rubber units. These rubber units are made from exactly the [fol. 254] same materials, the same rubber as are the standard, accepted, so-called apron type. In fact, even the weight and the size, which we have heard spoken of this morning, the average apron is 36 inches long and 24 inches wide. The most popular size of our rubber unit is exactly the same size in actual rubber displacement.

The rubber is a fairly good grade of what we call friction rubber, which has a reenforcing thread in it, which is exactly the same used in these flat apron type units. In fact, our units are molded at two of the plants where they are very large producers of the orthodox or apron type unit.

I put those on trucks. We fasten them generally with a solid form of angle iron attachment on the top end where they attach to the bottom of the truck. On the bottom end, it's optional with the consumer as to whether they use a couple of rods to come down to keep them fairly well in place, or just let them hang on a couple of chains.

If they hang it on chains, they can move in any direction, and they are flexible enough, well, they are as flexible as any of the apron type units that are being used at the time as your so-called orthodox flaps.

Q. I hand you a copy of Plaintiffs' Exhibit No. 1, which was received in evidence here, and ask you to examine the same and tell the Court if that is a contour type guard [fol. 255] which is attached on a tandem trailer?

A. Yes, sir. It's on a sliding tandem.

Q. On a sliding tandem. Does that indicate a proper attachment on that type trailer in your opinion, Mr. Eaves?

A. The general base of fastening to the trailer is correct,

but from an engineering standpoint, it is not a proper installation at all.

Q. Tell the Court why it is not, specifically.

A. The Illinois law provides that if there is five inches or less clearance between the top of the wheel and the under side of the body, when the truck is loaded to capacity, the fender should only come to within two inches or maybe stop two inches below the bottom of the body.

Now, in a sliding tandem, that is very much in the Statute, because if it hasn't got clearance between the top of the fender and the bottom of the body, when they slide that tandem back and forth, they pull it off.

You notice that this installation, the top of that fender appears to be right square up against one of those cross ribs of the body. Very definitely, if they hit a bump with a full load in that body, and that body traveled one or two inches, as it will when it goes in a spring axle, it will knock the top of that down, and it would knock the bottom end of it up.

Another thing we recommend to do is, first, we would [fol. 256] drop that back down at least two inches from the top of that body so they have complete clearance between the body and the top of the fender.

The next thing, it shows on the top side of the picture here, there is approximately a five or six inch clearance, which is satisfactory. But, if you will notice the bottom part, I doubt if there is two inches clearance between the under side of that fender and the tire itself. Now, the law says a three inch side flange on the outside.

Q. Two inch.

A. Well, a two inch side flange, and a six inch clearance between the fender and the wheel. If that is conformed with that stipulation, then, the four inch opening for clearance between the bottom edge of the flange and the tire tread, that gives us plenty of room to take tires off, put them on, clear any kind of a pack that might form under there from the rotation of the wheels or by the action of air over there. As we have it on this installation, you can very readily see that you should get a pack. You don't have enough room to get your hand in there.

Q. What should the spacing there be?

A. Well, the law says that the inside surface of that unit should be relatively parallel to the surface of the tire, and it stipulates further it should be a said distance from the wheel.

[fol. 257] Now, further, on installation, we would carry a bracket arm from this cross member up to the top of this fender to take out the weave or the vibration on the top. If you take any kind of a big piece of metal like that and suspend it in the middle, you are going to get this on the top. If you put a bracket here and here, you are going to eliminate that, and that eliminates the vibration that occurs in this type of suspension.

Judge Briggle: I take it that this is the contour flap guard on Exhibit 2. Is that the one you have?

The Witness: I think it is.

Judge Briggle: That is not of your manufacture?

The Witness: No, but the basic construction is the same, sir. There is no difference there. There are 12 or 15 manufacturers of units. We make a metal unit that is very compatable (sic) with that. As far as the installation problem and the installation technique, it would be exactly the same. But this is not ours, no.

By Mr. Husted:

Q. Do you manufacture an inside flange on the inside of the guard?

A. On one of them, we carry about a half inch flange on the inside just as an edging for the metal to reenforce the inside edge of that metal, so you just won't have a flat edge out here to be inclined to get bent or warped. On the out-

[fol. 258] side edge, we have a three inch flange.

Q. And when installed on a vehicle, how close to the ground do those manufactures (sic) by your concern usually come?

Mr. Axelrod: May I ask, Mr. Husted, does the three inch flange conform to the Illinois Statute?

Mr. Husted: A three inch flange? I would think so.

The Witness: The Statute says not less than two inches.

Mr. Husted: It says at least two, I think.

Mr. Axelrod: Well, you are talking about now something in excess of the statutory requirements which is the same position we had before with respect to the tests that Mr. Dolan made. You were objecting to something in excess of the Statute requirement.

Mr. Husted: I was objecting to using something in excess of the Statute in the test to show that something not in excess wouldn't work. I think I am on quite solid ground on that, insofar as the law.

Mr. Axelrod: I have no objection, if Your Honors please. I didn't understand the question, however.

The Witness: Would you repeat your last question, Mr. Husted?

Mr. Husted: Would you read me that, please.

(Question read by Reporter.)

[fol. 259] The Witness: We prescribe in our instructions they do not ever carry the metal portion of the fender below the hub line of the wheel, for if they do they have no protection of the metal section if they back into any kind of a stop. Generally, any kind of a stop they use is not any higher than the hub line of the wheel. Then, we consider that. We have a rubber skirt in the bottom of all our units 12 inches wide, and the law says they should be within 10 inches of the ground, and that would come within four inches of the ground, and they can cut it off.

By Mr. Husted:

Q. What is the purpose of that rubber skirt extending downward from the bottom end of the steel portion, if it is a steel portion, if it is a steel splash guard, what is the purpose of the rubber?

A. Basically, it's rubber to give flexibility in case they back into some kind of a loading dock or anything else in the way of an obstruction. They will pull that off without demolishing any part of the fender, or they can construct one from the rubber part out of a piece of belting at a nominal cost.

Q. As an automotive engineer, can you tell this Court that a splash guard meeting the specifications of the Illinois Statute, whether it's of your manufacture or of someone else's——

[fol. 260] Mr. Steiner: Now, if the Court please, I think we are assuming something not in evidence, and this is not being made from any disrespectful manner, but I don't think this gentleman has been qualified as an automotive engineer.

Judge Briggle: You may complete your question.

By Mr. Husted:

Q. As an automotive engineer, or as an engineer, a civil engineer who has been in the automotive field for a number of years, can you say that a splash guard meeting the specifications of the Illinois Statute will bear a reasonable relation to the minimizing of rear throw mud and water splash from the rear wheels of an operating truck on which it is mounted?

A. Yes.

Mr. Axelrod: Objected to, if the Court please. It invades the province of the Court, but beyond that it is without any foundation or experience and no qualifications whatsoever have been laid for the witness to answer this specific question yet.

Judge Briggle: You may answer subject to the objection.

The Witness: I answered it.

Judge Briggle: Go ahead.

The Witness: Yes, that is a fact, and we have conducted various tests to establish it as a fact, as well as to substantiate the fact through information available from tests [fol. 261] that are public tests, that are available to any public inquiry that might be made.

By Mr. Husted:

Q. What tests are you referring to?

A. We paid for one test which I was present most of the test. A member of the teaching staff of the University

of Michigan some years ago (sic) to perform a certain test, and that test was performed. I was present at part of it. We have illustrations of the test itself as well as the findings of it.

Q. Do you have any of those with you?

A. Yes, sir.

Q. Now, where were these tests conducted?

A. Conducted at the private home of a member of the staff of the University of Michigan.

Q. Who was he?

A. Dr. Allen.

Q. And where is this?

A. In Ann Arbor, Michigan.

Mr. Axelrod: If the Court please, Dr. Allen isn't here, and if there is any attempt to lay the foundation for a Dr. Allen report, we certainly object.

Mr. Husted: No attempt is being made to show other than some photographs which were made in Mr. Eaves' presence and concerning which he can testify, I submit, that they correctly show what they purport to show. Under [fol. 262] the Rules of Evidence in Illinois, those are admissible.

Judge Briggle: You may proceed.

Mr. Husted: Do you have those with you, Mr. Eaves?

The Witness: Yes, sir.

Judge Briggle: What did you say these were being made for?

The Witness: To establish the particular facts that are under discussion now, Your Honor.

By Mr. Husted:

Q. I hand you, Mr. Eaves, what purports to be a view of a truck equipped with a contour splash guard and ask you to examine the same and tell the Court what that is.

A. This is a tractor portion of a truck that is equipped with a contour guard and which was used in making tests to establish certain of the data which we required during the processes of development for field, and it was used with the same test for a contour guard and a flap guard, that is, just the vehicle which was used in a test.

Q. Did you take the photograph of which this is a reproduction?

A. No, sir.

Q. Were you present when it was taken?

A. Yes.

Q. By whom was it taken?

A. Either Dr. Allen or his assistant that took the pic-
[fol. 263] ture.

Q. When and where was this?

A. This is at the rear of Dr. Allen's home in Ann Arbor, Michigan, and I think it was in 1954, either '54 or '55. It was '54.

Q. Now, I hand you Plaintiffs' Exhibit 2 for identification—excuse me, Defendants' Exhibit 2, a page containing two reproduced photographs, and ask you to examine the same and tell the Court what these two reproduced photographs purport to show?

Mr. Steiner: May we see it before the witness answers, please.

Mr. Husted: Yes.

The Witness: These two photographs show this particular vehicle in one picture with a curved or contour type guard on, and the other with a rubber flap which has been placed so it would not sail.

By Mr. Husted:

Q. I hand you Defendants' Exhibit 3 and ask you to examine the same and tell the Court what that is?

A. This is a picture of the unit being operated at a set speed. The wheels are being operated at a set speed in a trough of water against a standard flap or apron type guard. The wheels are set at a speed of 45 miles an hour.

Q. Were you present when this photograph was taken, [fol. 264] or a photograph from which this is a reproduction?

A. There were a whole series of photographs taken, sir, and I would say yes. It may not have been this exact one; this or a duplicate. I was present when this series of photographs was taken from which this has been made as a reproduction.

Q. I hand you Defendants' Exhibit No. 4 and ask you to tell the Court what that purports to represent?

A. These are two pictures, one with a curved guard, and the other with a flap guard with a similar operation being performed whereby we had the wheels rotating in a continuously fed trough of water at a set speed, the same speed in both instances, and it shows the relative difference which was experienced by the two different units operated under the same conditions.

Mr. Steiner: If the Court please, I move that the last portion of the answer be stricken as being hearsay and not with any foundation as to what is relative.

Judge Briggle: I think the answer may stand.

By Mr. Husted:

Q. Now, do the pictures on these four pages of Defendants' Exhibits 1 through 4 correctly show that which they purport to show, that is, are they distorted?

A. No, sir.

Q. You were present at that time and place?

A. Yes.

[fol. 265] Q. And viewed the equipment that these are pictures of, is that correct?

A. I think we have the original of this, the original, yes.

Q. Now, will you explain to the Court the two pictures on Defendants' Exhibit No. 2, what they were lined up that way for?

A. Well, this test was set up on the premise that both the orthodox or apron type unit, or a curved or contour type unit had to be tested under exactly the same general conditions. So, we stipulate as a basis of the test that a trough had been made and which could be introduced a flow of water or sand or gravel or mud. The wheels were jacked up on this unit, and the opposite wheel was disengaged, and the speedometer was set so that we could establish the same speed of operation of the wheels, and under the same conditions we flowed water under and mud and gravel, etc., and that was it. This is the way the situation was set up just before the test actually started.

Q. Were you there during the actual performance of the tests?

A. Not all of them, only part of them, sir.

Q. Now, that is an immobile test?

A. This is a still point, though. I saw the unit many times, yes, as to the position that these pictures were [fol. 266] taken in.

Q. I hand you Defendants' Exhibit No. 3 and ask you to explain the same and the splash occasioned.

A. This is the test conducted with water, as I have detailed it, against a flat or orthodox type of flap, which shows a considerable amount of splash out to the side and through the top area there out to the back. Now, in this instance, this flap was braced so it could not sail backward from the force of the water being thrown against it, or the material being thrown against it.

Q. Now, I hand you Defendants' Exhibit No. 4 and ask you to explain those and significance thereof to the Court?

A. Now, this is the test conducted for the same purpose that where all of the conditions have been set to be exactly similar, and the pictures were taken under the same conditions of the water going backwards with the standard apron type flap not braced, but hanging free as it would hang on an ordinary installation, and the contour type flap anchored rigidly to the body here, as it would be, and the basis there was to establish the fact that this heavy material from the treads of the tires, which is the material which we are attempting to control, not the spray from the side of the wheel, but the heavy material that is thrown [fol. 267] in and upward from the rotation of those forward and centrifugal forces is actually stopped by contour guard and started in a downward direction again; whereas, with the flat unit, it sprays in every direction, and there is no preceptive material being redirected back down to the ground at the wheel point at all.

Q. Now, Mr. Eaves, based on your education and experience as an engineer, can you tell this Court what the general direction of the heavy material that you speak of, in what general direction is it thrown by the movement of wheels of a truck?

A. The dangerous material is thrown in and upward in a directly rear direction.

Q. What is the dangerous material?

A. What is what, sir?

Q. What is this material that you call the dangerous material?

A. Heavy mud, sleet, snow, ice, rocks, pebbles; all the materials such as rocks, for instance, that break windshields and so forth. They don't come off the side of the wheel. They are thrown directly by the tread of the wheel in a backward position, unless it is somewhat directed to come off the side.

Q. Without a splash guard of any kind, are you able to estimate how far back such heavy material would be thrown [fol. 268] by a truck traveling a muddy highway within the lawful speed limit?

A. Yes, sir.

Mr. Axelrod: Object to that if the Court please. There is no basis for that premise because none of the trucks are operated without a splash guard of any kind. There is no testimony in this record of that sort, no testimony, no indication by the witness even that trucks are operated without a splash guard of any kind.

Judge Briggle: He may answer the question.

The Witness: We have made numerous checks on road checks, and we also have been guided by a chart issued by the, I think it's the Commerce Commission, at the request of the Interstate Commerce Commission.

Judge Briggle: The question is, how far does it throw the mud?

The Witness: It will throw the mud at 45 miles an hour, according to the charts we have access to and the test we have made, at 45 miles an hour the top of the angle at which it is thrown at 45 miles an hour is approximately 20 feet, 70 feet behind the truck, and those figures were substantiated in this report of the Interstate Commerce Commission.

Mr. Axelrod: I move that that be stricken, if the Court please. There is no indication that there is any report [fol. 269] of the Interstate Commerce Commission substantiating that.

Judge Briggle: The last part of his answer about what the Commerce Commission did may be stricken.

By Mr. Husted:

Q. In your opinion, how far would such material be thrown, and how high would it be thrown at its maximum point of heighth (sic) on a truck traveling 55 miles an hour?

A. Probably not very much higher because your angle at which the material leaves your wheel would be about the same, but it would be thrown probably 15 to 20 per cent further. All material leaves the tread of a wheel like the centrifugal throw as you spin anything. It goes directly off and as the wheel rotates around, it comes off at different points on the top point or all the way around, and, if you get above 45 miles per hour, there isn't much difference in the trajectory or the angle, but there is a difference with the speed or force with which that material is thrown. So, it will go further, the faster the truck or vehicle is traveling.

Q. I see. You have associated, according to your testimony, with the automobile industry, for how many years?

A. Approximately 30 years.

Q. What has been the tendency insofar as the height [fol. 270] of materials—. Strike that please, Mr. Reporter.

What has been the tendency in car design insofar as the height of vehicles is concerned during the years that you have been in the automotive industry?

Mr. Axelrod: Object. Totally irrelevant. We are not concerned with car design at this point.

Mr. Husted: We are concerned with car and windshield heights. That is exactly what this is, what this Statute is designed to do, to reduce the splash. We purport to show that cars are materially lower than they were 30 years ago.

Mr. Stephenson: What we are concerned with, as far as my client is concerned, is how to get in and out of Illinois; and I just don't know what this has to do with what our problem is.

Judge Briggle: It relates to the question of safety. You may answer the question.

The Witness: Well, cars in the last 15 years have, of course, been lowered tremendously. The car 15 years ago stood anywhere from four feet to four feet six, even to five

feet high to the bottom of the windshield point, and several of them six feet to six feet six at the top.

By Mr. Husted:

Q. What is the range today?

A. From three foot six to about five feet, five foot six at the top of some. Some of your linousines (sic) will go as [fol. 271] high as six feet. Very few cars today have the very largest type where you have more than six feet from the ground to the top, and the majority of them have less than five foot six.

Q. What change has been made, if any, in splash equipment in the automotive industry during the time that you have been in it insofar as general trends are concerned?

A. In the automotive industry as a whole?

Q. Yes.

A. Starting back in 1900, of course, the fenders or the type of protection that was used on pleasure cars were a perfectly flat piece of material, canvas or metal, that came up or generally to a straight point out to the front fenders, and then gradually they were cut down over the wheel and made to follow the outline of the wheels.

One of the first big developments was the crown fender to crown the middle of it. We have gone down through the years, and you come to the point where practically the back wheels, or the majority of cars are covered at least 180 degrees in their coverage, and most of them are close to 200 degrees, because both the front portion of the body and the front of the wheel, and a portion of the body behind the wheels on the back wheels comes to, well, several inches below the actual axle line, which means that probably out of 380 degrees (sic) of that wheel there is well [fol. 272] over 200 degrees of it now covered with fenders of some kind.

Q. In your opinion, is a covered fender more safe than an open fender, or no fender at all?

A. Oh, yes, sir. Otherwise, the trend would not have been to that effect. It would have been to a rather dangerous thing on our present highway speeds and running down the highways with no fenders on, or fenders over wheels of the cars.

Mr. Husted: Tender the witness.

Judge Briggle: Any questions, Mr. Axelrod?

Mr. Axelrod: We do have, Your Honor.

Cross examination.

By Mr. Steiner:

Q. Mr. Eaves, for some reason or other I didn't get the name of your company.

A. Contour Truck Guards, Incorporated.

Q. Is that an Illinois corporation?

A. No, sir. That is a Delaware corporation.

Q. And are you an officer or director or shareholder in that company?

A. Yes, sir.

Q. Are you an officer?

A. Yes, sir.

[fol. 273] Q. What is your position?

A. Vice-president.

Q. Are you also a director?

A. I am, sir.

Q. And are you a shareholder?

A. Yes, sir.

Q. To what extent are you a shareholder in that company?

A. I don't know as that is pertinent.

Mr. Husted: That is not material, Your Honor.

Mr. Steiner: Well, I think it goes to the credibility of the witness' testimony and his interest.

Judge Briggle: It goes to the interest, of course, but the witness has said very frankly at the start of it that he is vitally interested.

By Mr. Steiner:

Q. Is that from a dollar and cent standpoint?

A. Yes, sir.

Q. Among other things, do you go out and solicit business and make telephone calls to various truck lines in an effort to sell your product?

Mr. Husted: That is neither germane to the direct examination, nor is it material to the issue in this lawsuit.

Mr. Steiner: I think it is.

Judge Briggle: Are you asking if he makes sales?

[fol. 274] Mr. Steiner: If he personally calls upon representatives of truck lines in an effort to sell this contour mudflap.

Judge Briggle: What has that to do with the case?

Mr. Steiner: Because I concluded from asking a question of Mr. Dolan, and Mr. Dolan informed me this is the man he had the conversation with in connection with the durability of these mudflaps. I have been precluded from asking that question because it was hearsay, and because it was out of the presence of the witness, and I have the witness here now.

Mr. Husted: You will have to call him yourself for that. That is not germane to the question.

Judge Briggle: I think the objection should be sustained.

Mr. Steiner: Will it be understood that the witness will remain here and that we may call him as our witness for that purpose?

Mr. Husted: Don't ask me that.

Judge Briggle: You want to call him to ask him questions?

Mr. Steiner: Whether he did in fact call Mr. Dolan to try and sell him contour mudflaps.

Judge Briggle: Well, whether he did or not, what's that got to do with this?

[fol. 275] Mr. Steiner: Mr. Dolan was asked the question as to the durability and how long these mudflaps would last, and the question was objected to by Mr. Husted, and the objection was sustained on the ground that the conversation with the sales representative was made in the presence of somebody who was not here in the Courtroom.

Judge Briggle: I don't believe that has anything to do with our case.

Mr. Steiner: All right.

Q. Now, in connection with the replacement of a mudflap which might become disengaged, the purchaser thereof wouldn't necessarily be required to replace it from your company, would he?

A. No, sir.

Q. So that you really have no accurate way of measuring whether or not and to the extent of how many of these contour mudflaps have in fact come disengaged based upon orders you get?

A. Only from the standpoint that anybody who is dissatisfied with the product either complains to the manufacturer of the product, the sales organization which they buy from, or else they don't rebuy.

Q. That is correct.

A. And on that premise, we have had no premise or no complaint to base the fact that we have had a high mor- [fol. 276] tality on this type of equipment.

Q. By the same fact, the fact they don't rebuy might lead you to indicate they are not satisfied?

A. I didn't say they didn't; I said they do rebuy.

Q. Now, if you have the conventional type of mudflap and it became disengaged, because of a flat surface it would just lay flat on the highway, wouldn't it?

A. Probably.

Q. That wouldn't be true in connection with the contour flap if it came off, would it?

A. On the flexible unit, yes, sir. It would lay maybe as high as, as high as the tread of a tire that was thrown off, a truck tire.

Q. I understand, even though it was flexible, it was nevertheless firm to comply with the Statute requirement to be rigidly affixed?

A. That was not a fact.

Q. What is the fact?

A. The requirement says that your unit has to follow the general parallelity of the wheel, but it says nothing about it has to be firm. It says it can be flexible, and these rubber units are just as flexible as it can be.

Q. How can it form and be completely parallel without rigidity?

A. You can mold a rubber ball. You can put your hand [fol. 277] on the top of a softball, and it will pop off again. The air pressure puts it back in the position or place because it's been molded in that position or shape.

Q. So, if it lays on the highway with nobody pressing on it, it's going to be up off the ground to the extent of natural curvature, isn't it?

A. Yes, sir, which is about three inches or maybe four.

Q. Now, with respect to the photograph, Exhibit No. 2, you didn't see that actual vehicle, did you?

A. No, sir.

Q. And your testimony is merely based upon your impression from looking at this picture, isn't that right?

A. Not that picture, no.

Q. Well, the other picture you looked at. Is this the one?

A. Yes, sir.

Q. Your testimony is based merely upon your impression from looking at a photograph, isn't that true?

A. Yes, sir.

Q. And if the witness testified here under oath that this was affixed in full compliance with the Illinois Statute, you wouldn't dispute that man's testimony, would you?

A. No, sir.

[fol. 278] Mr. Husted: He didn't say that it wasn't.

The Witness: I said that our engineer recommendation would not be to fix in that way.

By Mr. Steiner:

Q. Well, didn't you testify that there wasn't a two inch clearance, and that there were several other inaccuracies?

A. Insofar as our own specifications for installing were concerned, yes.

Q. Well, you wouldn't state that this was installed contrary to the law, would you?

A. Of course not.

Q. Now, with respect to the test you made that you discussed in Exhibits 1, 2, 3 and 4, those tests were not made with an actual vehicle moving over the highway, were they?

A. No, sir. You see, you can't make the same test of two different things moving over the highway. You have to have a stationary condition, a set of conditions all the way through.

Q. Don't you think that it would be more accurate and convincing and a more honest test could be made by installing the contrivance on the vehicle and actually driving it on the highway under actual driving conditions?

A. May I answer that in a technical way?

Q. Just answer "yes" or "no."

[fol. 279] A. Why, I say no, very definitely no.

Q. You don't believe, in your opinion, that by taking a contour mudflap and driving it on the highway 15 or 20 miles that you can get an honest test?

A. That isn't what I said.

Q. That was my question.

A. You can't get a comparative test. That is what I thought you asked me.

Q. Well, do I understand that if you took two trailers and put a contour mudflap on one and a conventional on the other and ran them side by side on the highway for 15 or 20 miles you couldn't get a fair test?

A. You sure could.

Q. Why didn't you do that?

Mr. Husted: That is immaterial. As a matter of fact, they did do that, but this isn't our whole case.

The Witness: May I establish this fact——

Judge Briggle: No.

By Mr. Steiner:

Q. There is nothing in the Illinois law that requires there be a contour mudflap on a tractor, is there?

A. No, sir.

Q. Was there any purpose——

A. (Interposing) In the interest of that test, we couldn't rotate the wheels of the trailer standing still. We could [fol. 280] rotate a tractor. We had to have power on them.

Q. You didn't need a contour mudflap on it, did you?

A. Sure, there is one on there.

Q. Now, when you made these tests, as it appears from these photographs, at least from the photograph on Exhibit 2, you apparently jacked up the wheels, is that correct?

A. Yes, sir.

Q. And after the wheels were jacked up, you lowered them down into a pan of water, is that correct?

A. They were jacked up, and they were started to rotate at a set speed and lowered.

Q. But, they weren't lowered directly to the bottom of that pan of water, completely to the bottom, were they?

A. No, because we had to maintain a level in that pan, a level of water, or we couldn't have made the test. If you would have lowered it to the bottom, you would have emptied the pan like that. You would have no water left.

Q. When the truck drives on the highway, it's on a flat surface on the bottom of the highway.

A. Yes, but there is a continual coat of water over that highway if the conditions exist that we are trying to rectify, either water or mud or snow.

[fol. 281] Q. Now, the movement of tire on the highway is in the opposite direction of the airflow from the front of the car, isn't it?

A. Yes, sir.

Q. And the spray or the splash, the greatest percentage, of course, goes to the rear, does it not?

A. Yes, sir.

Q. And when it goes to the rear, isn't it a fact, sir, that when it hits a firm, rigid object that it has no place to go but outward to the side?

A. Oh, yes.

Q. When you made your tests, were there any wind conditions prevailing? Was that taken into account?

A. Yes, sir. We tried to establish during the time that test was taken, we took the test generally when there was less than four or five miles an hour wind. That was a portion of the test factor.

Q. Have you ever obtained any patent on the contour mudflaps, sir?

A. We have patent applications covering construction of a contour type guard. You cannot patent a fender, and these are basically nothing but fenders.

Q. Have you ever been engaged in the manufacture of a conventional mudflap?

A. Yes, sir.

[fol. 282] Q. When you manufactured the conventional mudflap, did you ever have to worry about or consider the problem which was concerned with the backing up of the trailer to a stationary object?

A. Oh, very often.

Q. What if anything was done to alleviate that condition?

A. A particular design was worked out, and there were some sales made on a unit where you could destroy a portion of the bottom and replace it, which is generally what happened to the conventional type of flaps. The conventional type, you pull a section out of the bottom, or pull them half way up, and the top is left hanging. That of course is something that we don't do so much with the contour guards.

Q. Well, today the conventional flap is all in one piece, isn't it?

A. In one piece when they put it on.

Q. Yes.

A. Not all, sir. No, there is a flat flap, conventional flat flap you can buy in two pieces, detachable skirt on the bottom.

Q. Now, the test that you spoke about conducted by Mr. Allen in his own individual capacity and not on behalf of any institution, isn't that true?

[fol. 283] A. That's right, sir.

Judge Briggle: Is that all?

Mr. Steiner: Yes.

Judge Briggle: Is that all of this witness?

Mr. Husted: Yes.

Mr. Stephenson: I have a question, Your Honor, if I may.

Judge Briggle: Very well.

Cross examination (continued).

By Mr. Stephenson:

Q. As I understand, sir, the contour mudflap that you manufactured meets the requirements of the Statute in Illinois?

A. Yes, sir.

Q. If you know, does it meet the requirements of any other Statute of any other state?

A. We know that it is a standard, acceptable unit in any

other state that has a flat flap or other type of a guard law, of which there are about 25 states.

Q. All right. Now, taking Arkansas, do you agree with me that they have a regulation calling for a flexible type flap?

A. Do they have a state law in Arkansas?

Q. A regulation, sir?

[fol. 284] A. I am not familiar with the state regulations, sir.

Mr. Stephenson: Could I refresh the witness' memory from Exhibit 8, please?

Judge Briggle: Do you want to ask him about this Arkansas regulation?

Mr. Stephenson: I want to ask him if his mud guard meets the regulations of Arkansas.

Judge Briggle: You say you don't know what the regulations are?

The Witness: No, Your Honor.

Judge Briggle: Well, he can't very well answer your question.

By Mr. Stephenson:

Q. Well, have you been present throughout the hearing today?

A. Yes, sir.

Q. And have you heard discussion concerning an Exhibit 8, which is an order from the Arkansas Commerce Commission?

A. Yes, sir.

Q. And from your appearance and your being present, do you not have some knowledge now as to what the regulation is in Arkansas?

A. Only from the standpoint of the discussion on the stand, sir. I have never read the specification or have no [fol. 285] idea of the verbiage or wording. I do know that we have equipped numerous trucks during the last two or three months, and I can name a couple, if necessary, who traverse the State of Arkansas going south to further states that are now equipped with contour guards, and they are still going through Arkansas with contour guards on them.

Q. Has that been since the first of the year?

A. Not since the first of the year, but as late as, since the 15th of December.

Q. The order I refer to is dated December 13. Does that indicate why you haven't been selling mud guards in Arkansas?

A. No, we haven't sold any in Arkansas. I am talking about trucks in other states that are either from south of Arkansas or north, but they do go through Arkansas on some of their various routes.

Mr. Stephenson: May I ask the Court, please, if I could show him the specifications.

Judge Briggle: I don't think that is material.

Judge Mercer: I don't think it's relevant to the cross examination.

Judge Major: Objection is sustained.

Mr. Husted: I have one more question.

Judge Briggle: Is that all, Mr. Stephenson?

[fol. 286] Mr. Stephenson: Well, I do have another question.

Q. Much is made of his experience, his education and experience, and many questions were asked him of his opinion, and I'd like to ask this witness, based upon your education and experience, how would you solve a problem of operating between Arkansas and Illinois where each state has contrary regulations?

A. I am afraid, sir, I am not here in the capacity of trying to solve those kind of problems, but I would like to answer that.

If Arkansas has a basis of being able to not allow Illinois trucks into Arkansas because they have a specification in Illinois, then, why doesn't that work both ways and Illinois have the same right on Arkansas trucks?

Judge Briggle: Let's keep our attention on the issues in the case. That has nothing whatsoever to do with the Court's problem. Do you have a further question?

Redirect examination.

By Mr. Husted:

Q. I wanted to ask, Mr. Eaves, if this is a portion of the rubber type contour splash guard that you were cross examined on so extensively, and offer it in evidence if we can establish that it is a portion?

[fol. 287] A. Yes, sir.

Judge Briggle: He says it is.

Mr. Axelrod: If the Court please, the same attempt was made on redirect examination.

Mr. Husted: That would be within the province of the Court.

Judge Briggle: I don't see any serious objection. You may offer it if you wish.

Mr. Husted: I request that this be——

Mr. Axelrod: If the Court please, that isn't the whole flap. That is only a part of the flap.

Mr. Husted: It doesn't purport to be all.

Judge Briggle: All you are asking is if it was of the same material.

Mr. Husted: Same material. So much controversy has been made about the flexibility of material.

Judge Briggle: Do you want that marked as an exhibit?

Mr. Husted: As Defendants' Exhibit No. 5.

Judge Briggle: Now, is that all of this witness?

Mr. Husted: That is all, Your Honor. That is all.

Judge Briggle: You may proceed.

Recross examination.

By Mr. Steiner:

Q. Mr. Eaves, I direct your attention to the outer re-

[fol. 288] cessed portion of Exhibit 5 here.

A. Right here.

Q. What is attached to there?

A. Our construction is sectional, so a section can be replaced if destroyed.

Q. All I want to know is, what is attached down there?

A. Another section.

Q. And there is a flange then, isn't there?
A. Yes, sir, I see.

Mr. Steiner: There is nothing further.
Judge Briggle: All right.

(Witness excused.)

Judge Briggle: Call your next.
Mr. Husted: May I inquire, if Your Honors please, how late we are going to run tonight?
Judge Briggle: I can only answer that question by inquiring of you how many witnesses you have to offer.
Mr. Husted: It will be quite late if we finish, Your Honor, and I have a police officer that has to make a trip to East St. Louis tonight.
Judge Briggle: Well, you have three Judges here that are very busy also.
Mr. Husted: We are willing to proceed.
Judge Briggle: You may proceed. You may call him.

[fol. 289] Leonard Cooper called as a witness by and in behalf of the Defendant herein, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Husted:

Q. Will you state your name, please?
A. My name is Leonard Cooper.
Q. Where do you live, Mr. Cooper?
A. At LaPort, Indiana.
Q. What business or occupation are you engaged in?
A. I am in the plastic manufacturing business and the mold and tool and die business, two concerns involved.
Q. What relation do you have to the two concerns?
A. I am president of the Precision Mold and Tool Corporation and vice president, secretary and treasurer of the Plastic Surface Corporation.
Q. And do you have a vital pecuniary interest in the outcome of this lawsuit and in the manufacture of splash guards in conformance with the Illinois Statute?

A. I do in that one of our products is a polyethylene plastic splash guard.

Q. I see. What is polyethylene?

A. Polyethylene is a plastic material that is similar in [fol. 290] rigidity to rubber. However, it can be made in various stages of rigidity. We happen to be using semi-rigid material.

Q. Do the guards that you manufacture comply with the Illinois Statute?

A. To the best of my knowledge, yes, sir.

Q. They are manufactured with the design and intent that they would be, at least?

A. Yes, indeed.

Q. What are your specific duties in regard to these two corporations?—

A. As president of the corporation, I have the administrative duties, of course, and in charge of engineering, tool designing and the building of tools.

Q. I see. And you have been manufacturing these splash guards for how long?

A. We started early in 1956 to develop a guard and made our first guards from experimental mold in April.

Q. Or (sic) what year?

A. Of 1956, and made our first guards from production molds or permanent molds in September of 1956.

Q. Have you purchased or installed machinery for the production of these guards?

A. Yes, sir, we have. We have an 800-ton injection molding press which we purchased for this particular product. [fol. 291] Q. Have you conducted tests as to the operational effectiveness of these guards?

A. We have.

Q. What have your tests consisted of?

A. Our tests have consisted of road tests on various vehicles. Also, we were concerned with having the proper attachment so that the guard would not fall off, and we therefore made a fixture which vibrated the guard, simulated road conditions, and, in fact, were able to adjust this machine so that we could get ten times the vibration that it would receive on the road.

Q. And what was the result of the tests of your type splash guards?

A. We were unable to break the guard down. We also arrived at an estimate that the guard, while on this particular machine, received ten times the abuse that it would have on a truck, and through that accelerated test we estimated, purely an estimate, I want to emphasize, that the guard had about five years usage as far as vibration is concerned.

Q. Explain to the Court, if you will, please, how your type of splash guard controls rear and side throw and splash?

A. In developing our guard, of course, we had the law to help us in developing this guard. In other words, the [fol. 292] guard was made to conform to the Illinois law. We put the proper flange on, and our guard is made in three sections attached together by means of a mushroom button, is the best way I can explain it, which is molded as an integral part of the product.

Those mushroom buttons are pushed through holes in the flange on the opposite piece, or the connecting piece.

Then, in addition to that, we use three-eighths by one-half inch, I believe it is, or three-quarters inch length steel Cadmium plated bolts to secure the sections together in the corners. These flanges not only are used for holding the guard together, but also act as a distrubution (sic), gives it even distribution of the splash. We feel from the test that we have made that that does minimize the splash on the sides.

Q. Have you had any complaints from users of your equipment?

A. Yes, sir.

Q. What have those complaints been, Mr. Cooper?

A. I would say, first of all, the complaints that we have had have consisted of the lower tail section coming off. The complaints that we have had have been less than one half of one per cent of the number of guards that we have sold. In every instance, we have, upon due proof that [fol. 293] this problem did exist, we have replaced those sections without charge. Since then, we have made a change in our mold design to minimize the problem of losing the tail section.

Q. Do you have any moving picture of your splash guards in actual operation on the highways?

A. Yes, sir.

Q. Do you have that moving picture with you?

A. I have.

Q. How long does it take to show it?

A. It will take me about five minutes to set it up, and about ten or fifteen minutes to run it.

Mr. Husted: Defendants request leave, if Your Honors please, to show this brief moving picture. Plaintiffs have already viewed it, and I understand they have no objection to it.

Mr. Axelrod: That's right.

Mr. Husted: I know that would be time consuming, in view of what Your Honor has said, but I think you will see more as to the actual operation, both as to the flat type and contour.

Mr. Axelrod: Not as to the flap (sic) type, Mr. Husted, just as to the contour.

Judge Briggle: How long will it take you to complete your evidence aside from the picture?

[fol. 294] Mr. Husted: I'd say an hour and a half or two hours, Your Honor.

Judge Briggle: Well, make it as concise as you can. We will recess at this time, gentlemen. You can set up your movie projector and have it ready on the opening of Court in the morning.

Mr. Husted: Very well, sir.

Judge Briggle: And we will open Court at 9:00 o'clock, so you be ready to start your picture at 9:00 o'clock. We will see that first, if that is the procedure you wish, and then you can finish your evidence.

We would like very much to finish the evidence and the argument by noon, if possible.

Mr. Husted: I shall brief my evidence down as much as I absolutely can.

Mr. Axelrod: May I just take a moment, Your Honor. We have a situation where Scherer Freight Lines has been arrested and ticketed for failure to have the contour mud-flap. I have prepared a petition and an order.

I have spoken to Mr. Husted about it, and he has no objection to the presentation of the petition. It is the same as the Arkansas petition at the very beginning.

Judge Briggle: Scherer?

Mr. Axelrod: Scherer Freight Lines, Inc.

[fol. 295] Judge Briggle: They have been arrested for failure to comply with this Statute since the preliminary injunction?

Mr. Axelrod: Yes, Your Honor, two days ago.

Judge Briggle: Who is responsible for that, do you know?

Mr. Husted: No, I don't, but they were not covered by the injunction.

Mr. Axelrod: That is correct. Also, today, I received a telephone call, Mr. Steiner did, that another party, a client, Dohorn Transfer Company, have had two tickets for failure to comply with the Contour Mudflap Statute.

Mr. Steiner: Issued today.

Mr. Stephenson: Judge Briggle asked the gentleman if this was going to be applicable to all that day. I thought you were going to take it up with the state?

Mr. Husted: I don't know if the Department of Safety——

Judge Briggle: We may have 25 or 50 of these folks coming in with similar petitions before this case is determined.

Mr. Axelrod: And I hesitate to impose it on the Court.

Judge Briggle: Is there any reason why this preliminary injunction order should not be all inclusive? There is no reason why one trucker should be treated differently from another.

I don't remember just the language of the restraining [fol. 296] order, but the good faith inference, from it, at least, would be that no one should be molested until the Court determines this question.

Judge Mercer: That is an old story, Your Honor. It wouldn't be binding on anybody except those named in the complaint, but it certainly would appeal to me the same way.

Judge Briggle: Now, of course, this arrest that you speak of might have been by some remote constable.

Mr. Steiner: No, by the Department of Public Safety.

Judge Briggle: The Department of Public Safety? You tell the Department of Public Safety that they have got no business doing things of this kind, Mr. Husted, and that unless we have assurance from them that this will not occur again, we will consider very seriously in the morning and on the opening of Court in the amendment of this preliminary order to make it all inclusive.

Mr. Husted: I shall convey that, Judge. Let me briefly state that they adopted the policy of doing that. Now, what caused this mixup, I don't know.

Judge Briggle: You are seeking to intervene here now?

Mr. Axelrod: Yes, Your Honor, on behalf of the single Plaintiff, Scherer. I'd be happy to withdraw it at the moment.

Judge Briggle: Well, you withhold that until 9:00 o'clock [fol. 297] in the morning and until Mr. Husted can convey this to the Department. Is there some conflict in your office about it?

Mr. Husted: I don't think so, and we will have the superintendent of the state police here in the morning.

Judge Briggle: I wish you would.

Mr. Husted: We planned to anyway.

Judge Briggle: He probably doesn't grasp the full significance of good faith compliance with a temporary injunction. Your office would, but maybe he doesn't grasp the full significance of it.

Mr. Husted: I can't say.

Judge Briggle: You have him here in Court.

Mr. Husted: I will do that.

Judge Briggle: On the opening of Court at 9:30 o'clock. Court will stand adjourned until 9:00 o'clock in the morning.

(Whereupon, the hearing in the above-entitled cause was adjourned until 9:00 o'clock A. M. of the following morning.)

* * * * * * *

[fol. 299]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

SOUTHERN DIVISION

[Title omitted]

ORDER RE FILING OF BRIEFS—January 16, 1958

Again comes the parties to the above-entitled cause by their respective attorneys, and the further trial of said cause is resumed before a three-Judge Court, and the Court having heard all the evidence on behalf of defendants, and the arguments of counsel, and not being fully advised in the premises takes the case under advisement.

It is ordered by the Court that Plaintiffs file their brief by January 30, 1958—Defendants to reply by February 10, 1958, and Plaintiffs to reply by February 15, 1958.

[fol. 300]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

SOUTHERN DIVISION.

[Title omitted]

Transcript of Proceedings of January 16, 1958

Proceedings had and evidence taken in the above-entitled cause before the Honorable Charles G. Briggle, Frederick O. Mercer and J. Earl Major, Judges of said Court, in the Courtroom in the United States Court House at Springfield, Illinois, on the 16th day of January, A. D., 1958, commencing at nine o'clock A. M.

Present:

Same as before.

[fol. 302] Proceedings

Judge Briggle: You may proceed for Defense.

Mr. Husted: If Your Honor please, the sworn witness Mr. Cooper, with the permission of the Court, will show

this moving picture and will narrate the same to the best of his ability.

Judge Briggle: Very well.

Mr. Axelrod: If the Court please, there is part of the picture that we agreed that is not to be shown, as a matter of fact, and we hadn't gotten to that point before Your Honors came in. In fact, we were supposed to run this film another few minutes down to here before it's to be reviewed by the Court.

Judge Briggle: You tell us when not to look.

Mr. Husted: The reason for that, Your Honor, is our position is that these flat type flaps are not in issue here, and I think it would be inconsistent for us to put that in. For that reason, I agreed to show pictures only concerning the contour flaps.

Judge Briggle: You may turn out the lights, Mr. Bailiff.

Mr. Axelrod: If the Court please, since we are sort of off the record here, I hope you did look at that Navajo schedule there.

[fol. 303] (Whereupon, short comments were made off the record.)

Leonard Cooper resumed the stand as a witness called by and in behalf of the Defendants herein, having been previously sworn, was further examined and testified as follows:

(Whereupon, a motion picture was shown in the body of the Courtroom, during which showing the witness gave the following narration:)

The Witness: This is the start of our picture showing the contour guard, which is a polyethylene guard. The reason that the young lady is lifting those so easily is because each one only weighs seven pounds.

This picture here shows the guard being mashed into the tire, and when he releases it, it snaps right back in position.

This picture here is the truck is mounted stationary, and the wheels are turning under power in order to throw gravel, and shows that the gravel is being knocked down to the ground.

As we go along here, they are feeding gravel in under the tires, as you will notice.

Here is an installation which has nothing to do with the law, but it is an installation mounted on a tractor and is very effective. It can easily put in under the trailer, [fol. 304] fifth wheel being engaged, and he is now ready to pull away. A polyethylene guard does not ice or snow does not adhere to polyethylene.

This part of the picture shows that the installation does not affect the maneuverability of the truck or trailer.

Here, we are backing up against a large timber to show what happens with this particular guard when it is backed into an object such as a loading ramp or a post. Again, I say it mashed right into the tire, and then when he pulls away it snaps right back into position, not damaged.

This shows the mounting on another truck. It's a single axle.

Here is a mudhole, and a very severe test, because that mudhole is deep. You will notice the mud not being splashed up to the height of the windshield.

In this particular picture you will see a splash when the wheels first hit it, and then it is knocked right down to the ground and minimizes the side splash. There, you see the gravel falling off of the truck. If you will notice, you will see the back end of the trailer on a gravel road, and we are running at about 40 miles an hour. We are not getting any gravel thrown up on the windshield.

There, we are running with one wheel on the shoulder, [fol. 305] and again we are raising very little dust and not throwing any gravel to a height of the windshield.

This picture here shows the truck traveling at about 45 miles an hour, and there is no sail to the guard. It stays fixed.

This picture here just shows an installation on a tractor which again has no bearing on the law.

Direct examination (continued).

By Mr. Husted:

Q. Now, Mr. Cooper, is this material, polyethylene, that you have mentioned, of which your particular kind of

splash guards are made, is that same material utilized in any household operation with which most people are familiar?

A. Yes, sir. The polyethylene is used in ice cube trays. Many people think that is rubber. Well, they can't use rubber for that particular use because of the sulphur content which would make your ice cubes taste, even though you made a cocktail, it would still taste of this sulphur. So, they use a polyethylene, which gives you the flexibility, and it is another proof that ice will not stick to it.

Mr. Husted: I tender the witness for cross examination.

[fol. 306] Cross examination.

By Mr. Stephenson:

Q. Mr. Cooper, I think I have just one question, sir. From the observation of the type of mudflap that you are manufacturing, and to tie it in with the problem of my client, is it one that can be carried in the vehicle and readily put on, say, at a state border, and then removed as it leaves Illinois, for example? In other words, is it readily attachable and detachable?

A. I can best answer that from the experience that we have had with our mechanic.

When we first developed this guard, and he had no prior experience to assembling them to the trailer, it took him one hour to assemble our guard. Now, that is on a single axle job. I would say that from experience that I have had it would take a little longer to mount on a tandem.

Mr. Stephenson: Thank you, sir.

Cross examination (continued).

By Mr. Axelrod:

Q. Mr. Cooper, the pictures which you showed were of a single axle trailer all the time, is that correct?

A. That is correct.

[fol. 307] Q. You recognize, do you not, that the Plaintiffs in this case, the carriers who are here involved, operate sliding tandems in their over the road operations?

A. Yes. And we have installations on sliding tandems.

Q. Now, sir, you indicated that you had attempted to develop an attachment which would offset vibration. Do you recall that?

A. If I made (sic) that, sir, I was in error.

Q. Did you indicate that you had made a test in connection with the determination of whether or not vibration would affect the guard as it was attached to the vehicle?

A. We made a machine, a vibrating machine in order to find out what we had to do in order to develop a bracket in order to eliminate as much as possible the danger or the damage that would be caused by the vibration which you are bound to get over the road.

Through this test, we found that we were able to develop a bracket out of a certain quality of steel that would not break or fatigue under constant vibration.

Q. When did you develop the manufacture of this particular bracket, as of what date?

A. In October.

Q. Of what year?

A. Of 1956.

[fol. 308] Q. Tell me, sir, were the vibrations which you made in connection with this test, were they made to simulate the operation of a vehicle over the road?

A. Yes. And then we were able to also change the amount of vibration in order to make it, in our opinion, and in the opinion of a trucking operator, about ten times the amount of vibration you would get over the road.

Q. Was the vehicle that was used a vehicle without cargo in it, without load in it?

A. Oh, yes. It was a machine that we put right in our lab.

Q. Well, then, as I understand it, you didn't use a vehicle?

A. Not for that particular test because we couldn't get the excessive vibration that we wanted. But we did, in addition to that, make many road tests on a vehicle.

Q. The test that you spoke of with respect to vibration was made not with a trailer or a vehicle, is that correct?

A. That is correct.

Q. When you took the pictures that you showed to the Court, how far back from the back of the trailer were you

driving in the car, and incidentally, first, did you take these pictures?

A. I did not take all of them. I did hold the camera on [fol. 309] some of the pictures, and I was present when all of the pictures were taken.

Q. All right, sir. How far back was the car being driven from the end of the trailer when the pictures were taken?

A. At varying distances ranging from ten feet back as far as fifty feet.

Q. How fast were you going in the automobile?

A. We were traveling from 40 to 50 miles per hour.

Q. Where did you focus the camera?

A. Through the windshield.

Q. Are you sure the windshield was a clean windshield when you focused the camera through it?

A. Yes, sir. I think the picture itself depicts that.

Q. Well, there was a good deal of haze in part of the picture, was there not?

A. I didn't think so.

Q. Do I understand that your guard is attached to the vehicle with a steel brace, is that correct?

A. It varies with the type of equipment.

Q. Well, in the case of a sliding tandem, if you were to equip a sliding tandem, what kind of attachment or bracket would you use?

A. It would be steel, but would be the bar going across [fol. 310] the carriage, that would be a pipe.

Q. A pipe?

A. Yes.

Q. Made of what?

A. Made of steel.

Q. And would there the brackets be of steel as well as the pipe portion?

A. Yes, but it would be a different pipe than what we were showing in the picture.

Q. You say it would be? Is it?

A. Yes. I'm sorry.

Q. I take it that the picture showed a new contour guard, is that correct?

A. No. That guard that was on there was about six months old.

Mr. Axelrod: That is all I have, if the Court please.

Judge Briggle: Is that all of this witness?

Mr. Husted: That is all.

(Witness excused.)

COLLOQUY BETWEEN COURT AND COUNSEL

Judge Briggle: Gentlemen, at the close of yesterday's session, Mr. Axelrod presented some request in reference to a trucking company not a party to this suit.

Mr. Husted: Yes, Your Honor.

Judge Briggle: And you stated that you would ask somebody to come here?

[fol. 311] Mr. Husted: Chief Morris, and he is here, Judge.

Judge Briggle: Well, what is the situation?

Mr. Husted: The situation, Judge, was that they had not been arresting these truckers. We will show that with later testimony here. That is, they have not been arresting any interstate truckers. I don't think they have been arresting any, but through a misadvertence, apparently, some officer—where was this, in the northern part?

Mr. Axelrod: Northern part, near Lockport.

Mr. Husted: Some officer did make an arrest. It's not a general policy, and there was an (sic) affrontment to the order of this Court, I can assure you, by either of the Defendants. In fact, we will show by evidence that as many as 740 trucks came through a single weight station without the lawful guards, and that no arrests were made, that is, in one weight station on one day, if Your Honor please. So, I can assure you that there has been no policy of technical or substantive nature.

Judge Briggle: Is Mr. Morris present?

Mr. Husted: Yes, he is.

Judge Briggle: Have him come forward.

What is the name of the company?

Mr. Axelrod: The company was Scherer, S-c-h-e-r-e-r, Scherer Freight Lines, Inc.

Judge Briggle: They were arrested where?

[fol. 312] Mr. Axelrod: Your Honor, they were arrested at Lockport.

Judge Briggle: On complaint of whom, do you know?

Mr. Axelrod: Complaint of Milton J. Munch, who signed it as an officer. I don't know who that would be.

Mr. Morris: Milton J. Munch is the trooper.

Judge Briggle: He is one of the officers under your command?

Mr. Morris: Yes, sir.

Judge Briggle: Officer Morris, did you know anything about this?

Mr. Morris: I did not, sir.

Judge Briggle: When was it called to your attention?

Mr. Morris: I just heard about it last night, sir.

Judge Briggle: Well, in December, this Court issued a temporary restraining order requiring Mr. Bib, as Director of the Department of Public Safety, and yourself, as superintendent of the Division of Highway Police, not to interfere with the complainants in this proceeding, which were a number of different trucking companies.

Mr. Morris: That's right, sir.

Judge Briggle: Until the further order of the Court. Of course, the purpose of that, you well know.

Mr. Morris: Yes, sir.

Judge Briggle: And while the Scherer Freight Lines [fol. 313] were not parties to this proceeding, technically you are not required to restrain from arresting them, but a good faith interpretation of this, of course, I should think would require you, as well as the Department of Public Safety, not to interfere with the operations of any trucking companies until the Court had time to decide the question that is before the Court.

Mr. Morris: Yes, sir.

Judge Briggle: Do you agree with that?

Mr. Morris: I do, sir.

Judge Briggle: Well, then, what do you propose to do about this arrest in Lockport?

Mr. Morris: Well, let me say this, sir, we have received a written opinion from the Attorney General's office that came into the Director Bib's office, and I received a copy of it which it stated, it listed the six companies. It also stated that they were the only ones affected, that enforcement could be carried on. Like Mr. Husted said, we had no

policy on it. I am sure that there were not too many of these made. In fact, this is the first one. But, we had a policy of not enforcing.

Mr. Axelrod: There were two yesterday issued against Dohorn Transport Company. I received that call here yesterday, Chief. I thought perhaps that indicated sort of a commencement becaise (sic) it developed more than just the [fol. 314] single instance.

Mr. Morris: Other police departments use the uniform traffic ticket, but I see this is ours.

I can take care of this, as far as getting a continuance on it, sir, until a decision is reached by the Court.

Judge Briggle: That would be all right except the date would be too uncertain for that, I would think. Why don't you dismiss these complaints or the arrests which have been made without prejudice to again institute them in the event the law is held to be a valid law.

Mr. Morris: All right, sir. I can do that.

Judge Briggle: Don't you think, Mr. Husted, that would be the correct thing to do?

Mr. Husted: I think that would be a fair way to correct this.

Judge Briggle: Well, with that understanding, do you need to present an order?

Mr. Axelrod: No, Your Honor.

Judge Briggle: We were confronted here, Chief, with the proposition presented by counsel which would require subsequent restraining orders in reference to his complaints, and in reference to any other trucking company. We want to treat them all alike.

Mr. Morris: There's a lot of them.

[fol. 315] Judge Briggle: So, if you have that understanding about it, and the Attorney General's office does that, I guess that would be satisfactory.

Mr. Axelrod: Thank you, Your Honor. We withdraw our request.

Judge Briggle: We did consider, and I could amend the order to make it all inclusive, that is, that these Defendants not do anything to interrupt the operation of the Plaintiffs here, or any other persons similarly situated. But I don't know whether that is necessary or not. Probably it isn't.

Mr. Morris: It would help us.

Judge Briggle: Would it help you?

Mr. Morris: Yes, sir.

Judge Mercer: I think, if the Plaintiff could include that as far as his prayer——

Mr. Axelrod: We do not have that in our prayer because the suit is not in the form of a representative suit.

Judge Briggle: That would make the order more or less of a representative suit.

Mr. Axelrod: Yes, it would, Your Honor. And perhaps technically there is a question with respect to that type of an order in view of the complaint as it stands. I could amend our complaint and would be very happy to do so. I thought perhaps we could easily work it out between our-[fol. 316] selves. But, if the Chief thinks perhaps it would be a helpful situation to him policy-wise, perhaps that is the best way to do it.

Mr. Morris: I think it would.

Judge Briggle: Well, the Attorney General's office and the Chief's office here agree with us that there should not be any prosecutions until this matter is determined; isn't that it? You can give all of your officers those instructions. You don't have to apologize to them or tell them why you are doing it.

Mr. Morris: The Attorney General's office will give us that in writing.

Judge Briggle: Are you willing to do that?

Mr. Husted: Yes. We will take care of that.

Judge Briggle: I think that will be sufficient then.

Mr. Husted: Yes, sir.

Judge Briggle: Those that have been instituted will be delayed or dismissed, delayed in some fashion. Of course, that will not defeat your right to reinstitute them if the law is held to be valid.

[fol. 317]

LUCIEN N. JOHNSON called as a witness by and in behalf of the Defendants herein, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Husted:

Q. Will you state your name, please?

A. Lucien N. Johnson.

Q. What is your place of residence?

A. Route 1, Elwood, Illinois, Will County.

Q. What is your business or occupation?

A. Lafayette Metal Processor, Fabricators of Metal, metal fabricator.

Q. What is your position or connection?

A. Vice president.

Q. What does that company manufacture?

A. Well, we manufacture many items for the agricultural industry, and many items of smaller things for different companies at LaFayette, Indiana.

Q. You manufacture contour splash guards?

A. We are definitely a manufacturer of contour splash protectors.

Q. Would you describe briefly to the Court the style and type of contour which your company makes?

[fol. 318] A. Well, our splash protector is made from 16 gauge cold-rolled steel, prime steel. It's a full 21 inches wide, 21 or 24 inches, whichever is desired. We do 21 inch width splash protectors for smaller tires, 8¼ and below; above 8¼ we use a 24 inch wide fender, a contour fender. It is rolled to any radius that you so desire. If you want it rolled on a tight radius, we can roll it on any radius that you want by using our machines on air activated. With 2 inch lip as prescribed by law on both sides of the splash protector.

Q. You make yours on both sides?

A. That's right. Then, we run a stiffener ridge down the center of the splash protector to give it more rigidity.

Q. Now, when did you become connected with your present company?

A. April 16, 1956.

Q. What did you do prior to that, Mr. Johnson?

A. I was safety engineer for Marcel Service, Inc.

Q. What is Marcel Service, Inc.?

A. Marcel Service, Inc. is the parent company to the American Fidelity & Casualty Company, which is the insurance company, and the largest carrier of PL and PD on highway transportation in the world.

Q. What were your duties while with that company?

[fol. 319] A. Safety engineer.

Q. I know, but what were your safety duties as safety engineer?

A. My job was to converse with top management, safety directors of different assureds, help them set up their safety program, periodically check equipment on their lot, and make my reports as to any defects or so on and so forth.

One of the biggest jobs was to observe the insured equipment on the road under actual operating conditions.

Q. During the time that you were actively engaged as a highway safety engineer, did you form any conclusion as to the necessity of splash equipment in the midwest, specifically in Illinois?

Mr. Axelrod: I am objecting, if the Court please. I don't think this witness is authorized to speak at this point in respect to a prior capacity. He is not here on behalf of Marcel Company, and he is here only ostensibly as a manufacturer.

I don't think that he is entitled to speak on the subject drawing upon an experience in the case where he was representing another company, Marcel.

I think that the proper witness for that should be a Marcel witness, and not this gentleman, who is no longer [fol. 320] connected with Marcel. I think he is without qualification to speak.

Judge Briggle: Well, I would think he might properly speak on any subject matter which he has personal knowledge. However, the question, if I understood the question, asked him if he reached any conclusion about the necessity of splash guards in this part of the country.

Mr. Husted: That's correct.

Judge Briggle: Well, don't you all agree to that, tha there is a necessity for splash guards?

Mr. Husted: I don't know whether the Plaintiffs do o not.

Mr. Axelrod: We have splash guards, Your Honor.

Judge Briggle: They all use some kind of splash guards don't they?

Mr. Axelrod: Yes, Your Honor; yes, we do.

Judge Briggle: I don't think there is any question abou that.

By Mr. Husted:

Q. Have you observed the operational effect of not onl your own splash guards of your own manufacture, bu those of other manufacturers, using the highways toda which meet the specifications of the Illinois law?

A. Certainly, I have.

Mr. Axelrod: Now, if the Court please, the witness ha [fol. 321] answered the question.

Judge Briggle: All right.

Mr. Axelrod: I don't think the witness ought to voluntee beyond the specific question.

Judge Briggle: He's answered the question.

By Mr. Husted:

Q. Would you describe to the Court the reasons for you answer?

Mr. Axelrod: Now, if the Court please, I don't thin that is an appropriate kind of a question.

Judge Briggle: I don't think Mr. Husted intended tha He answered the question that he had observed the oper tion of various kind of splash guards.

By Mr. Husted:

Q. In what way does the contour splash guard defle or minimize side throw and splash and rear throw an splash?

A. To the best of my knowledge——

Q. To the best of your knowledge.

A. —it will deflect anything. When the wheels are turning and throwing debris from the road to the rear, if you don't have a splash guard, it will continue in its flight, as brought forth in this Court.

If you have a splash guard, it will deflect that stone, water, mud, or whatever it is, to the ground.

Now, with our splash protector with the two inch side radius, or any splash protector that meets the specifications [fol. 322] of the State of Illinois, with the two inch radius on the side, it is bound to throw it down instead of straight out because the lip on the side will have a tendency to throw it to the ground.

Q. Now, when you speak of throwing it to the ground, at what stage of the splash is it thrown or hurled downward? Is that before or after the material strikes the splash guard?

A. It's after.

Q. Does your company have any trucks?

A. Yes, sir. We have two of our own trucks.

Q. Are they equipped with splash guards?

A. They certainly are.

Q. How long have they been so equipped?

A. Ever since we have been in business. The first ones that we made, we put on our own trucks.

Q. Are you required by law to have them?

A. Yes, sir, because we run into the State of Illinois.

Q. I see. And tell the Court the experience that you have had with the splash guards on your own trucks?

A. Well, we started in the splash guard business; one of my partners in the business owned and operated an interstate truck line, owned the Vandergraft Truck Line.

As we were in the metal fabricating business, and this [fol. 323] law became known in the State of Illinois, he said, "Can you make something I can put on my trucks?" Lafayette Processors is in no way connected with the truck line. We made something for his trucks to comply with the Illinois law. After they were perfected and put on the truck, other carriers saw them and began asking questions and said, "Why don't you manufacture and produce," be-

cause at that time there was, I think, only two or three manufacturers of contour splash guards in the country.

Q. Are you personally familiar with the use and operation of these splash guards on the Vandergraft trucks?

A. That's right.

Q. Do you know how many were placed on that truck, the trucks of that line?

A. We placed them on the drive wheels and the rear wheels also, about two years ago.

Q. On how many units, though?

A. Two units.

Q. On two units?

A. That's right.

Q. And how long did they last, or how long have they lasted?

A. They are still there.

Mr. Axelrod: I am objecting, if the Court please. I [fol. 324] don't think this witness is qualified to speak for Vandergraft. I don't think this is the best evidence of this fact. I think some evidence from Vandergraft, or a witness for Vandergraft ought to be here.

Judge Briggle: Is it true that you do have personal knowledge of the facts that you are testifying to about the Vandergraft truck?

The Witness: Yes, certainly. Mr. Vandergraft is secretary-treasurer of our corporation.

Judge Briggle: That wouldn't give you personal knowledge about the splash guards on the truck.

The Witness: He operates his trucks, sir, out of the same place we have our business.

Judge Briggle: Well, you have seen the trucks; you know they have been on there two years, do you?

The Witness: Definitely.

Judge Briggle: Let it stand.

By Mr. Husted:

Q. Describe their present condition?

A. Very good shape.

Q. Now, based on your experience which you have testified to as a highway safety engineer, do you have an

opinion as to, do you have an opinion as to the cause of accidents involving passing or meeting trucks on wet weather, in wet weather?

A. Well, definitely. As I stated before, I have traveled [fol. 325] the highways of this state a good many miles up and down, backwards, and in all kind of weather.

When you are behind a unit that has no splash guards at all, or inadequate splash guards, and he is throwing mud and water all over your windshield, when you move into a path of which a truck is a comparatively slow moving vehicle, and a passenger car definitely tries to pass, and you get mud and water thrown all over your windshield, you momentarily lose your vision. Well, when you lose that vision and you drop the left side of your car off the paved area of the road, and you try to right it back on, you are going to roll your car, and I know that there has been many, many accidents caused from that.

Mr. Axelrod: I am objecting. I move that this testimony be stricken from the point where he says "I know many, many accidents have been caused from that." There's been no foundation laid for allowing that kind of testimony to stand, if the Court please.

Judge Briggle: I think that may stand. That is subject to your cross examination. I don't know how he knows it, but he says he knows it. Let it stand.

By Mr. Husted:

Q. Do these type of accidents always or usually involve a collision?

Mr. Axelrod: That is objected to, if the Court please. The question is too general, "Do these type of accidents." [fol. 326] I think we are entitled to a specific inquiry here. I don't know what he is referring to by "these type of accidents." Where? When? What?

Judge Briggle: Objection is sustained to the form.

By Mr. Husted:

Q. In accidents or mishaps involving traffic passing or meeting trucks, based on your experience and knowledge

and observations on the highway, do these always involve a collision between the passing or meeting vehicle and the truck?

Mr. Axelrod: That is objected to, if the Court please. There is no foundation laid for any of that kind of testimony. We don't know what he is talking about. Passenger cars frequently pass trucks. That is a very common situation. Where? When? What? Under what conditions? Under what circumstances? The question, even if answered, would be meaningless to this Court, I submit.

Judge Briggle: I understood the question to be does the splashing of refuse on the car always cause an accident. The answer to that obviously is "No." They don't always cause an accident.

Mr. Husted: My question was, "In these type of mishaps, is there always a collision; is there always a collision?"

Judge Briggle: Well, what was your answer? Let him answer.

The Witness: No. It's usually just one car involved.

[fol. 327] By Mr. Husted:

Q. What frequently happens to that car?
A. The car is turned over.

Mr. Axelrod: If the Court please, that is objected to, and I move the answer be stricken. "That car;" it's such a meaningless answer for this record. I submit it adds nothing to the record, not specific.

Mr. Husted: Well, now just a moment.

Judge Briggle: Let the answer stand. Go ahead.

Mr. Husted: What was your answer?

The Witness: The car usually turns over due to the fact that when you read in the paper that there is only one car involved in an accident, you read where the car, the driver lost control of the automobile. Well, actually, when he lost control of that automobile, when you drop off on the pavement onto the shoulder of the road, you drop down a little bit. If the driver gets nervous and tries to whip it back on, he is going to roll it. If he will go

along with it and come down on and cut his speed down, fine. He does lose control of the car. There is no question about that.

Mr. Axelrod: I move to strike that answer. It's apparent the witness is talking on the basis of hearsay testimony. He refers to newspapers. I think it's obvious what the information has been gleaned.

Mr. Husted: The important part of his testimony was [fol. 328] from his own observation.

Judge Briggle: I think I will let it stand subject to the objection. Proceed.

By Mr. Husted:

Q. And have you investigated accidents of this nature where there was no actual collision between the truck and the passing or meeting vehicle that you have reference to?

A. Yes, sir, I certainly have. Many times, and I might——

Judge Briggle: You have answered the question.

Mr. Axelrod: Please, sir.

Judge Briggle: Is that all of this witness?

Mr. Husted: That is all, if Your Honors please.

Judge Briggle: You may cross examine.

Cross examination.

By Mr. Axelrod:

Q. Do you have anything to do, sir, with the operations of the Vandergraft Truck Lines?

A. I didn't understand the question!

Q. Do you have anything to do with the operations of Vandergraft Truck Lines?

A. None whatsoever.

Q. May I please call your attention to Exhibits 1 and 2. You indicated that your flap had a flange on both sides, [fol. 329] the inside and the outside; is that correct?

A. That's right.

Q. And I show you for identification Plaintiffs' Exhibit 1. Is your contour mudflap one that has a flange on the inside just as the picture shown in Exhibit No. 1?

A. It has.

Q. And does it also have the same type of a flange on t outside, just as is shown in Plaintiffs' Exhibit 2?

A. It has.

Q. That type of design or manufacture is, in your op ion, in accordance with the Illinois Statute?

A. Certainly. It's over, a little over. The law says Illinois you must have a two inch on the outside but doesn't say you can't have them on the inside.

Q. Why do you make it on the inside if the law does require it?

A. Because that is the way our machines are design

Mr. Axelrod: I see. That is all I have, Your Honor.

Mr. Stephenson: May I ask a question.

Judge Briggle: Very well.

Cross examination (continued).

By Mr. Stephenson:

Q. You mentioned something about your trucks com into Illinois. Where is your plant located, sir?

[fol. 330] A. Home office is at LaFayette, Indiana, a they did a lot of hauling from the A. E. Staley Manufact ing Company at Decatur, Illinois.

Q. I do have another question, sir. These mudflaps th you are testifying to that your company manufactur can they be carried in some part of the vehicle, the cab, that they could be attached to the vehicle along the side the road some place?

A. Certainly.

Q. How much space would they take up?

A. Well, our fender, as I stated to the Court is on t 1000 tire 24 inches wide and 40 inches overall length in contour.

Q. Have you seen these cabs——

A. (Interposing) They could be nested, for your inform tion, one could be set inside of the other.

Q. Well, you have seen these cabs that hold just one ma that is, just the driver, have you not?

A. What's that?

Q. You have seen the tractors that hold just one man, the driver?
A. Yes.
Q. You have seen those?
A. Uh-huh (affirmative).
Q. Wouldn't be space in the cab and carry the mud [fol. 331] guards there, would you?
A. I have never studied the interior of a one-man operation cab. I don't know how much room there really is in those cabs.
Q. Well, there is room for a man to sit. Now, where would you put them?
A. Well, I don't know. I don't know.

Mr. Husted: I object to that. That has nothing to do with this witness' testimony or with the problem at hand.
Judge Briggle: Is there anything further?
Mr. Stephenson: Nothing further.
Judge Briggle: That is all.

(Witness excused.)

William H. Morris called as a witness by and in behalf of the Defendants herein, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Husted:

Q. Will you state your name and address, please, sir?
A. William H. Morris, 905 Westview Drive, Springfield.
[fol. 332] Q. What official position do you hold in the state government?
A. Superintendent of Illinois Highway Police.
Q. Are you the Defendant in this present action?
A. Yes, sir.
Q. How long have you been Superintendent of the Illinois State Highway Police?
A. Since February, 1956.
Q. And prior to that?

A. I was Assistant Superintendent for one year.

Q. Briefly describe your duties as such superintendent?

A. Well, being an administrative officer, I have at the present time about 1050 state policemen under my command assigned throughout the State of Illinois. Most general orders are issued out of our office on different duties of the State Highway Police.

Q. Do you have a communication system with all of your personnel at the various locations over the state?

A. Yes, sir. If they are on duty, they are in radio equipped cars, and also our 14 police districts have radio connections.

Q. Now, on September 1, 1955, you were the assistant to the superintendent, is that correct?

A. Yes, sir.

[fol. 333] Q. And you were until what date, did you say?

A. As assistant superintendent?

Q. Yes.

A. February 1 of '56.

Q. I see. Since September 1, 1955, during the time you were either assistant superintendent or superintendent, has it at any time been brought to your attention by any of your personnel in the field that these contour splash guards have been a problem because they fall over or disengage from the vehicles?

Mr. Axelrod: That is objected to, if the Court please. In the first instance, there wouldn't be any likelihood for anybody to complain to the police, and any information relayed from any policemen to the chief, I submit, would constitute hearsay testimony.

Mr. Husted: I didn't ask him for any information. I asked him if he received any. I am not trying to put the specific message in.

Judge Briggle: You are inquiring about a previous law. This law became effective on January 1 of this year, I take it.

Mr. Husted: Yes.

Judge Briggle: The previous splash guard law that you are referring to became effective when?

Mr. Husted: September 1, 1955.

[fol. 334] Judge Briggle: And you are asking him if he had any complaints about these matters you refer to?

Mr. Husted: Yes.

Judge Briggle: Following that date?

Mr. Husted: Following September 1, 1955.

Judge Briggle: Well, he may answer whether he did.

The Witness: I have never received any information on it, no, sir.

By Mr. Husted:

Q. Have you received information from the personnel in the field involving other truck equipment falling from the vehicles?

Mr. Axelrod: That is objected to, if the Court please. Other truck equipment is not in issue in this proceeding.

Mr. Husted: Just a moment. Mr. Axelrod, less than 20 seconds ago, you stated that in the normal course of events this information wouldn't come to the chief, and I think we can show that it does frequently, on various kinds of equipment, but not on splash guards. They are the ones that have put all the question of these splash guards constituting such a menace.

Judge Briggle: But this Court is not concerned with other equipment.

Mr. Husted: That is quite correct.

Judge Briggle: The objection is sustained.

[fol. 335] Mr. Husted: I tender the witness, Mr. Axelrod.

Mr. Axelrod: I have no cross.

Mr. Stephenson: I have nothing.

Mr. Husted: I have one more question.

Mr. Axelrod: If the Court please, there's been no cross.

Judge Briggle: He's overlooked something.

By Mr. Husted:

Q. Do you know of any accident that has been caused in the State of Illinois since September 1, 1955 that has involved or been caused by in any way a contour splash guard meeting the requirements of either the 1955 Statute or the 1957 Statute?

A. I do not, sir.

Judge Briggle: All right. Is that all?
Mr. Husted: That is all.
Judge Briggle: Anything further?
Mr. Axelrod: May I ask the chief one question, please.

Cross examination.

By Mr. Axelrod:

Q. Chief, do you know of any accident that has occurred since January 1 of 1958 involving any splash or spray?
A. I do not, sir.
Q. Any during the year 1957?
[fol. 336] A. I have no information on that, no, sir.
Q. Any during the year 1956?
A. No, sir.

Mr. Axelrod: That is all, sir.

(Witness excused.)

Mr. Husted: Mr. Lason, please.

Volli Lason called as a witness by and in behalf of the Defendants herein, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Husted:

Q. Will you state your name and address, please?
A. My name is Volli Lason.
Q. Where do you live?
A. Chicago, Illinois.
Q. What business are you engaged in?
A. The milk business.
Q. What company or organization are you associated with?
A. Capital Dairy Company.
Q. What is your precise connection with that company?

A. I am superintendent of maintenance, and I am in [fol. 337] charge of all the trucks, like traffic manager.

Q. Are you part owner of that organization?

A. I am not.

Q. Do you have any connection with any of the splash guard manufacturing or distribution interests?

A. No.

Q. How long have you been engaged as traffic manager of Capital Dairy Company?

A. Oh, about 22 years.

Q. How many trucks does that dairy company operate?

A. Operates 135 with engines in them and about 35 trailers.

Q. What is the area of operation of those trucks?

A. Well, most of the fleet is in the City of Chicago and the metropolitan area with a radius, we'll say, of 30-40 miles, and then we have what they call the tank trucks and big trailers. Some of them go as high as 250 miles out.

Q. In what directions do they go?

A. Wisconsin, Indiana and Illinois.

Q. Does your fleet of trucks operate the year around?

A. All year around.

Q. Are your trucks equipped with rear wheel splash equipment of any kind?

[fol. 338] A. Yes, they are, all of them.

Q. What kind are they equipped with?

A. The contour splash guards.

Q. How long have they been so equipped?

A. We put them on starting in '55, and they were all on about a year ago.

Q. Do you remember of what time of the year in 1955 you first began installing these contour guards?

A. Well, it was during the summer months, July or August.

Q. Do you have any way of determining what portion of your trucks are operated within the corporate limits of the City of Chicago?

A. Well, about 65 per cent of them is strictly in the corporate limits.

Q. What specific delivery or operation do those trucks make?

Mr. Axelrod: If the Court please, as I understand the law, it intended initially to exempt operations in the city, did it not?

Mr. Husted: It still does; I think so.

Mr. Axelrod: That being the case, Your Honors, the law would exempt the operation of this Statute in this city. I don't see any purpose in belaboring the record at this point. Whether or not they have them is of no consequence. [fol. 339] It doesn't require them in the city.

Judge Briggle: Even though it doesn't require them, if he operates them in the city, that would be pertinent on the question of durability.

Mr. Axelrod: All right, Your Honor.

By Mr. Husted:

Q. What specific operation do your trucks make within the City of Chicago? What milk product or dairy product do they deliver?

A. In the City of Chicago, they deliver the finished product.

Q. And from your experience, with these contour guards over the past 2½ years, tell the Court, please, of your experience with them insofar as the durability of these guards is concerned?

A. Well, we have replaced a number of bottom flaps, which would wear out from all this mud and so forth, kicking against it, which is made out of rubber. We had to replace two or three center pieces due to these accidents where an automobile would ram one of our trucks or something.

Q. Are you able to determine what the average life of a guard would be in the absence of a collision or some outside force that would destroy it?

A. Well, we haven't replaced any of them from wearing out, just the bottom section. But we have repainted them.

Q. I see. Have you observed their operations on the [fol. 340] streets and highways with the eye and intent of determining whether they reduce or minimize side throw and splash of mud and water?

A. Well, from this extent, the rear of the truck would always get very dirty, and we would have to wash the

trucks an average of four times a week. Now, the rear of the truck does not get dirty, and we, instead of having three washers, only have one washer.

Q. And when did you have three?

A. Previous of this contour flap.

Q. What can you say about the mud and water splash on your license plates and stop and flicker lights?

A. They get very little now. We used to get a number of tickets with dirty license plates and dirty tail lights and so forth, but that has been practically now eliminated.

Q. Why?

A. Because it doesn't kick up like it did before all that mud and that.

Q. Have any of your trucks lost or had dislodged these type splash guards in the absence of a collision or outside force of some nature?

A. No, they haven't been lost, but they got smashed.

Q. From what, Mr. Lason?

A. Like if an automobile would ram it, we'll say, would [fol. 341] skid into it or something.

Q. But from ordinary wear and tear is what I am getting at?

A. How do you mean?

Q. Have you had any become disengaged just from ordinary wear and tear of the operation of the vehicle?

A. No, it hasn't. But, if it would, it is hooked up on two different ends, so one end would always hold it.

Q. Do you know what you and your company paid for these splash guards?

A. They average out about $10 a set.

Q. $10 a pair, you mean?

A. Yes.

Q. And were they installed by someone else?

A. We installed them in our own shops.

Q. Was that installation under your personal supervision?

A. That is correct.

Q. Tell the Court what the cost of that installation was?

A. When we first got them, we studied the quickest way to put them on, and we made ourselves a jig to set them on, and after we got through, we were able to set them on

within an hour on each truck, and a number of large fleets have come in and made samples of our jig, which includes [fol. 342]. Armour Company, Bowman, Swift, Latch and Cartage and so forth.

Q. What is your hourly cost of labor in your own shop, mechanical labor?

A. Well, I believe with the overhead it would run about $4.00 an hour.

Q. Now, Mr. Lason, have you from time to time, over the years, gone to special schools, conducted by automotive interests, mechanical schools?

A. Well, we go to one once a month, and I believe during the 20 or 22 years I have been in the garage, I must have gone to at least 15 different short term schools.

Q. Did you ever go to one in which brake structure and design and equipment was the main topic?

A. Yes, I did.

Q. What school was that?

A. If I am not mistaken, that was the Northwestern University. I think that was a two week course.

Q. And when was that, Mr. Lason?

A. Oh, I'd say two or three years ago.

Q. Did you at that time study heat temperatures within and on the outside of brake drums of trucks?

A. That is correct.

Q. Were you present in Court yesterday when this test was described to the Court?

[fol. 343] A. I was.

Q. In your opinion, based on your observation and study, what comment or statement can you make to the Court concerning a temperature of 400 degrees within the brake drum of a truck?

Mr. Axelrod: Objection, Your Honor. This witness certainly hasn't been qualified as an expert to venture an opinion with respect to the test conducted by Witness Dolan. I submit utter and complete lack of qualification or foundation, with all due respect to the witness.

Judge Briggle: The objection should be sustained with respect to the present question. There is no ruling on the part of the Court as to his qualification.

Mr. Husted: I beg your pardon?

Judge Briggie: Without any ruling with regard to his qualification.

By Mr. Husted:

Q. Have you conducted heat tests on the inside of brake drums of trucks?

A. I personally haven't.

Q. Have you observed the tests being made at various places?

A. Oh, yes.

Q. Do you know of your own personal knowledge what is a safe temperature insofar as the efficiency of the braking system is concerned for drums, brake drums of trucks?

[fol. 344] A. Well, I do know that when our trucks——

Mr. Axelrod: I think the witness has answered he does know. That is the end of the question, I believe, sir.

Judge Briggie: You do know? Is that your answer?

The Witness: Yes, yes. I——

Mr. Husted: Just a moment. I will ask another question.

Q. How hot can a brake drum become and still have the braking system and equipment operate effectively?

A. 1,500 to 1,600 degrees.

Mr. Axelrod: I submit, Your Honor, I don't think this witness has been qualified to answer the point at this point. There's been a complete lack of foundation laid.

Judge Briggie: I think the answer may stand. Objection is overruled.

The Witness: Between 1,500 to 1,600 degrees is normal in heavy traffic.

By Mr. Husted:

Q. Now, are you talking about the inside temperature, or what Mr. Dolan——

A. (Interposing) The inside——

Q. (Interposing) Just a moment. —(continuing) or what Mr. Dolan termed the instantaneous outside temperature?

[fol. 345] A. I am speaking of the temperature where the brake lining hits the drum, on the inside.

Mr. Husted: Tender the witness.

Cross examination.

By Mr. Axelrod:

Q. Mr. Lason, what kind of vehicles are used in your city deliveries?

A. In our city deliveries?

Q. Yes.

A. Whites, Dodges and some Macs. (sic)

Q. I mean, what kind of a vehicle are they that make your city deliveries?

A. What do you mean by "what kind"?

Q. Well, are they straight trucks?

A. They are straight trucks and semis.

Q. Do you have a number of straight trucks that perform city delivery service for you?

A. That's right.

Q. You sell to the retail trade, do you not?

A. Only to stores and hospitals and institutions. We do not have any house-to-house delivery.

Q. You sell to stores, is that correct?

A. That is correct.

Q. And in selling to stores, where do you park your [fol. 346] vehicles in making the deliveries? Do you park them on the street?

A. Well, most of them, now, like food markets and hospitals, all of the loading docks are in the back.

Q. Do you sell to stores that do not have loading docks?

A. Some of them.

Q. A great many of them, do you not?

A. That is your city delivery only?

Q. I am speaking of city deliveries only. That is true, is it not?

A. That is true.

Q. The trailer equipment which you operate, is that single axle trailer equipment?

A. Single and tandem both.

Q. How many tandem axle do you have in your fleet?
A. How many?
Q. Yes, sir.
A. They are all tandems.
Q. All tandems?
A. All but one.
Q. Do you use your tandem axle equipment in city operations?
A. City and highway.
Q. City and highway operations?
[fol. 347] A. That's correct. They are 35 foot trailers.
Q. Mr. Lason, who suggested your coming here to testify today?
A. Who suggested?
Q. Yes.
A. I received a letter from Mr. Husted, or from the Attorney General's office, and in the letter it was marked that I should call them long distance collect, which I done, and he asked me to come out here and explain what it was for.
Q. What did he ask you to do in the letter, to call him?
A. Yes, that is correct.
Q. Do you happen to know how he searched you out of all the people in the State of Illinois to call for the purpose of suggesting that you come in here and testify?
A. Oh, yes.
Q. How?
A. I believe at the previous trial I wrote him a letter about these flaps and the benefits that I received from them.
Q. At a previous trial?
A. Previously, when this was coming up for trial, maybe a year or two ago, something like that.
Q. The tandem trailers that you own, are they the slid-
[fol. 348] ing tandem trailers?
A. That is correct. Four of mine are sliding type.
Q. Four of them are the sliding kind?
A. Fruehauf make. They are all 35 footers, all four of them.

Mr. Axelrod: That is all I have, if the Court please.
Judge Briggle: Anything, Mr. Stephenson?

Mr. Stephenson: No, Your Honor.

Mr. Husted: I have one question to ask, one or two.

Redirect examination.

By Mr. Husted:

Q. When you spoke of your installation in an hour or less at a cost of $4.00, approximately, did you intend to include in that your tandem and sliding tandem equipment as well as the semi trailers?

A. Well, on your tandem, there is one more item added to it, your square cross bar going across, which would run, I believe, about $7.00 or $8.00. That is what I believe it would run, that square tube that we use.

Q. Are you and your personnel able to install these contour guards on your sliding tandem equipment so that the tandem can be slid without uncoupling or unfastening the contour guard?

A. That is correct.

[fol. 349] Q. You do not have to molest that?

A. You do not. It's hooked up to the tandem, not to the trailer.

Q. Now, Mr. Lason, you testified that your trucks ran up into Wisconsin?

A. That's right.

Q. And that they ran up there the year around?

A. That's correct.

Q. Describe to the Court the experience you have had in their operations up north of Chicago and into Wisconsin insofar as concerns these splash guards picking up ice and snow.

Mr. Axelrod: We are objecting on the ground it's beyond the scope of the cross examination.

Mr. Husted: I am putting this on. I request leave——

Judge Briggle: We'll permit him to ask it on redirect.

The Witness: Well, we haven't had any problem on the snow, if you are referring to a jamming up around that flap. We get a lot of snow or ice under the trailer, but right at that particular point with the wheel turning, we never had any trouble.

By Mr. Husted:

Q. I am talking about between the wheel and the splash guard?

A. We have never had any trouble there.

Q. Have you had any mud pack trouble in that same area?

[fol. 350] A. No.

Mr. Husted: That is all.

Mr. Stephenson: I have a question now, Your Honor.

Recross examination.

By Mr. Stephenson:

Q. You say you are operating your trucks up in Wisconsin, sir. Is that pursuant to authority from the Interstate Commerce Commission?

A. No, sir. We are independent haulers that haul only for ourselves.

Q. I see. Therefore, you have no duty to the public such as the Plaintiffs in this case? You have no duty to perform any service toward the public at all?

A. Yes, we have. Only as far as safety.

Q. Well, I understand that, but you have no duty to haul anything for anybody except yourself?

A. That is correct.

Mr. Stephenson: That is all.

Mr. Husted: That is all, Mr. Lason.

(Witness excused.)

[fol. 351]

JOHN STUPER called as a witness by and in behalf of the Defendants herein, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Husted:

Q. Will you state your name, please?

A. John Stuper.

Q. What is your business or occupation?

A. I am captain of Illinois State Highway Police.

Q. How long have you been a captain?

A. About 2½ years.

Q. How long have you been with the police force?

A. 16½ years.

Q. Going back over a period of 5 years, what has been your duties with the equipment?

A. Well, up until 2½ years ago, I was a lieutenant assigned to District 9 Headquarters, which is a Springfield area.

Q. And then, in the past 2½ years, what have you been doing?

A. In the past 2½ years, I had the title of administrative officer working out of the central office.

Q. And what specifically have been your duties as such [fol. 352] administrative officer?

A. Supervising the truck wing program, the official truck testing station, and also the inspection officer for the State of Illinois, or state police of Illinois.

Q. When this first contour splash guard law was passed in 1955, did you, at the request of your superiors, conduct some tests on the highways in this vicinity using such equipment?

A. Yes. Several times I was asked to go out and observe a truck under certain operating conditions.

Q. Did you do that?

A. Yes, sir.

Q. Do you have any recollection of the exact days that you conducted these tests?

A. I do of one.

Q. What time was that?

A. That was back in February the 26th of 1957.

Q. In whose company were you at that time?

A. Mr. Cooper of the Plastic Surface Corporation.

Q. Is that the Mr. Cooper that is here in Court?

A. Yes, sir.

Q. Did you and he go out on the highways and test some of this equipment?

A. Yes, sir.

[fol. 353] Q. And who else were present, if anyone?

A. Well, there was no one else present in my car.

Q. Were you in the car with Mr. Cooper?

A. He was in my automobile.

Q. I presume that was a state patrol car?

A. Yes, sir.

Q. Tell the Court what this test consisted of?

A. Well, that particular day we started this test about 1:30 P. M. It was raining and snowing quite heavily. There was a fairly strong wind, so, we left the Armory Building, which is located at Second and Monroe, and we drove west out of Springfield on Route 125 for a distance of approximately seven miles. There was quite a bit of water, mostly water on the highways. As I mentioned before, it was raining quite heavily with a little snow mixed in with the rain.

The driver of this unit that we were testing was instructed to ever so often run the right wheels off the edge of the pavement onto the shoulder.

Q. Let me interrupt a minute. Was this vehicle a truck?

A. This was a semi truck trailer with three axles.

Q. Did it have contour guards meeting the specifications of the 1955 Act at that time?

A. Yes, sir, on the rear axle.

[fol. 354] Q. On the rear axle, of course. And describe the operational effect of that splash guard to the Court, from your observation at that time and place.

A. As I mentioned before, this truck driver was instructed to run the vehicle off on the shoulder at the edge of the paved portion of the highway ever so often so we could get the full effect of any mud, gravel or water and so forth that usually lies on the edge of the pavement.

Q. How far were you following behind that vehicle?

A. Well, it was different distances. Naturally, I am just guessing on the distance, but we started back at approximately 200 to 300 feet, and I kept driving up closer to the vehicle.

What I was trying to judge, most of this spray and throw of mud and so forth was by my windshield wiper as to the effect it had on the windshield wipers as being able to clear the windshield as to my vision.

Q. How close were you able to travel and still have a

clear view, that is, insofar as your windshield wiper was concerned?

A. Well, this particular truck that was equipped with this contour guard, I could drive right practically within 20 or 30 feet of the rear of the unit, and my windshield wipers had no trouble keeping the windshield clean enough that I had fairly good vision.

[fol. 355] Q. Were you able to tell by watching this truck in operation why you were able to go that closely without having thrown splash, snow and splash on your windshield?

A. I was naturally watching the rear of the truck, the action of the guards, the spray and so forth. I can't say just why, but I know I wasn't getting enough of a spray or back throw there to obscure my vision.

Q. Where was this spray and debris blowing?

A. It was mostly blowing out to the sides of the vehicle. As I mentioned before, there was quite a strong wind that day.

Q. Did the splash guards tend to thrust this material downward?

A. It seemed to, yes, sir.

Q. By "downward," do you mean toward the road surface?

A. Toward the pavement.

Q. How close were you able to drive up to that without encountering blurred vision—not blurred vision, invisibility due to debris on the windshield?

A. I would say roughly, approximately 30-35 feet. I didn't want to get any closer due to the safety part of it.

Q. During the times that you have dealt with this trucking problem, are you aware of any threat to safety or hazard occasioned by these contour guards falling off and [fol. 356] being obstacles on the highway?

A. No, I haven't.

Q. Have you ever heard of a one?

A. No, sir.

Mr. Husted: That is all.

Cross examination.

By Mr. Axelrod:

Q. Captain Stuper, if the contour guards or flaps do fall off and lie on the highway, would they present a dangerous obstacle to traffic?

A. Would they?

Q. Yes, if they light on the highway, would they?

A. I don't know just what type of guard there would be.

Q. Well, if they were of the kind of guard that was made either of steel or polyethylene, or of a combination of steel and rubber with braces?

A. Well, I believe they would probably be more of a danger from a steel guard than there would from a rubber or molded guard or a plastic guard.

Q. Wouldn't there be some danger even from a molded or a plastic guard?

Mr. Husted: Defendants will concede if they fall off the highway, they will be an obstacle to traffic and be a threat [fol. 357] to safety on the highway.

Mr. Axelrod: Well, apparently the captain isn't willing to concede it.

Mr. Husted: I think he will.

Judge Briggle: Let the record stand on the concession.

By Mr. Axelrod:

Q. As I understand it, it is your statement that the contour guard effect was to thrust the debris or the splash downward and sideward instead of backward, is that correct?

A. Let me say this:——

Q. Isn't that what you said, Captain?

A. Well, I think the question that was asked was where this material, this spray and so forth was going?

Q. Yes.

A. Instead of coming directly back, most of it was going to the side.

Q. Yes. Captain, do you recommend driving within a 20 foot distance from the rear of a trailer on the basis of the weather conditions under which you were driving that day with snow and ice?

A. No, sir.
Q. That would be unsafe, wouldn't it?
A. I would think so.

Mr. Axelrod: That is all I have, Your Honor.
Judge Briggle: That is all.
[fol. 358] Mr. Husted: That is all.

(Witness excused.)

Mr. Husted: Donald Johnson, please.

DONALD F. JOHNSON called as a witness by and in behalf of the Defendants herein, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Husted:

Q. Will you state your name and address, please?
A. Donald F. Johnson, 1106 George Street, Alton, Illinois.
Q. And you are with the Department of Public Safety, State Highway Police Division, obviously?
A. That's right, sir.
Q. How long have you been with them?
A. For 7 years and 6 months.
Q. What is your present duty?
A. Sergeant, District 11, East St. Louis, Illinois State Police.
Q. I will ask you to state to the Court whether or not on or about January 5th or 6th of this year you were requested to conduct a 24-hour test period at the Litchfield scale No. 32, which is on Route 36 in—I can't think of [fol. 359] the county—in Illinois?
A. That is true.
Q. Pursuant to that order or request, did you so conduct such a test?
A. Yes, I did.
Q. What did you test, what did the test consist of?
A. Can I look at my notes?

Q. Absolutely, yes. First, did you make a written memorandum or report of that test?

A. Yes, I did.

Q. Do you have that before you?

A. I have it here.

Q. What did your test consist of?

A. We were instructed to count the total number of trucks passing the Litchfield scale located in Illinois Police District 11 on Route 66 at Litchfield, Illinois. We were instructed, I was instructed to check the total number of trucks passing the scale in a 24-hour period and to keep a written record. We were to check each of these trucks for the following: Trucks that had the new type contour splash guard, trucks that had the old type splash guard, and those trucks that did not require the new type contour splash guard.

Q. Was this test conducted on a 24-hour period during that day?

[fol. 360] A. Yes, it was, sir.

Q. Was it all under your supervision and direction?

A. I was there from 8:00 o'clock in the morning until 5:00 o'clock in the evening.

Q. I see. And were the other personnel who helped conduct the test under your supervision and direction?

A. I instructed the two troopers who took over at 4:00 o'clock in the evening on the 4:00 to 12:00 shift and instructed them what do (sic) do, what to count, how to keep the record, and they in turn instructed the men that came on, the two troopers that went on duty at midnight.

Q. How many trucks passed that Litchfield scale and came through the scale inspection during that 24-hour period, the total number of trucks?

A. Well, the total number of trucks that passed the scale, those that weighed and those that did not weigh was 1,954 trucks.

Q. Of those, how many had the contour type splash guard?

A. Of that number, 933 did not have the new type contour splash guard.

Q. 933. How many did have?

A. Of that number, 714 had the new type contour splash guard.

Q. And by "new type," do you mean one meeting the [fol. 361] specification of the Illinois Statute?

A. That's right, sir.

Judge Briggle: How many? What were your figures?

Mr. Husted: 714, Your Honor.

Q. How many are not required, that is, in-transit trucks and the like that are expressly excluded from the requirements of the Statute?

Mr. Axelrod: If Your Honor please, Judge Smith in the Circuit Court recently held that there was no such thing as an exclusion under this Statute, that the exception that called for the exclusion was unconstitutional. I object on the ground that he——

Mr. Husted: He hasn't held that.

Judge Briggle: What is your question?

Mr. Husted: The question is how many were not required to have either type of splash guard because of their construction or nature. All of these splash guard requirements in Illinois and elsewhere exempt buses and trucks——

Judge Briggle: Well, that calls on the witness to tell whether they are required or not, and that would be perhaps a disputed question of law and fact.

Mr. Husted: I see. Very well.

Q. Let me ask the witness the question this way: How many trucks had neither the old style apron type flap nor the new style contour flap?

[fol. 362] A. In that period, we have a count here of one that had neither.

Q. Do you have a count of 306 trucks included in that 1,954?

A. We have a count of 306 trucks that did not require the new type contour splash guard.

Mr. Stephenson: May I have that last figure, please?

Mr. Husted: 306.

Judge Briggle: He says they didn't require the new type. Was it because of the injunction order of this Court that they didn't require it?

The Witness: No, sir, Your Honor. It was due to the fact that the way they are constructed, they are constructed so as to not require in the opinion of the enforcing officers, require the new type splash guards.

Judge Briggle: Did they come within the exception provided in the 1957 law?

The Witness: Sir, are you referring to the farm trucks and dump trucks?

Judge Briggle: Yes.

The Witness: No, sir. I'm sorry, sir, you are right.

Judge Briggle: It came under that exception?

The Witness: That's right.

Judge Briggle: Well, all right. Smith did hold that [fol. 363] was unconstitutional.

Mr. Husted: He hasn't done so, no. He has by letter, a memorandum to the attorneys has indicated that he is going to, but he still hasn't done it.

Judge Briggle: Maybe he hasn't entered the order.

Mr. Husted: He hasn't determined his post trial motions is what he hasn't done, Your Honor.

Judge Briggle: All right.

Judge Mercer: Were you in that matter before Judge Smith?

Mr. Husted: I tried that case, yes, sir.

Q. Mr. Johnson, have you reduced your report to writing?

A. In that we have all the figures and what the figures actually——

Q. (Interposing) That is what I mean. And you have signed it?

A. Yes, sir.

Q. Is that a true and correct report of the findings of you and the other men that assisted in the taking of this test?

A. Yes, sir.

Mr. Husted: Do you have any objection to this in evidence?

Mr. Axelrod: I don't have any objection. This is no [fol. 364] more than what the witness has in fact said, as I understand it.

Mr. Husted: That's right, just for the convenience of the Court.

Mr. Axelrod: I have no objection except I fail to see its relevancy. I object on that ground. But since the testimony is in already, why, I will withdraw that objection.

Mr. Husted: I have one more question of the witness, Judge Briggle.

Judge Briggle: All right.

By Mr. Husted:

Q. Were any of these trucks that did not have the new type arrested, Officer?

A. Yes, sir, one.

Q. Were they arrested for that reason?

A This truck was arrested, sir, because it didn't have any flap at all, neither the new type nor the old type.

Mr. Axelrod: He should have been arrested.

Mr. Husted: Request this be marked Defendants' Exhibit No. 5. You may cross examine.

Mr. Axelrod: I have no questions of this witness.

Judge Briggle: Any questions?

[fol. 365] Cross examination.

By Mr. Stephenson:

Q. Sergeant, of the 1,954 trucks that passed this station on the date, as I understand, this was the early part of January, 1958?

A. That's right, sir, January 9th and 10th.

Q. Of the number of trucks in this study test that you have just testified, sir, 1,954, you would not know how many of those were engaged in interstate commerce, is that correct?

A. No, sir. We didn't check them for that information.

Mr. Stephenson: Thank you, sir.

Mr. Husted: I have one more question.

Redirect examination.

By Mr. Husted:

Q. Would a truck engaged in interstate commerce be any more or less apt to lose its splash guard than one engaged in intrastate commerce?

Mr. Axelrod: I object. I think that is sort of an odd type of question.

Judge Briggle: Objection will be sustained.

Mr. Husted: That is all.

(Witness excused.)

[fol. 366] Offers in Evidence

Mr. Husted: If Your Honors please, I have some certified weather reports from four weather stations in Illinois, Cairo, Springfield, Peoria and Chicago, and a resume thereof certified over the signature of Luther A. Jones, the state climatologist, who was prevented from being here this morning, and request that judicial notice be taken of these records, that they be admitted into evidence to show that the range of days of precipital rainfall in Illinois range from 110 to 120 days per year, and that the average rainfall in the State of Illinois ranges from a mean of 42 inches per year down to a mean of 34 inches a year.

Judge Briggle: Your purpose is to show the necessity of mudflaps?

Mr. Husted: That is correct, that is correct.

Judge Briggle: Do you concede the necessity of mudflaps, gentlemen, for the other side?

Mr. Stephenson: I think there should be some protection as for (sic) the public is concerned. We are not conceding as to what type.

Judge Briggle: I am not saying anything about what type, and the question only concerns the necessity, gentlemen, and I thought that everybody conceded the necessity.

Mr. Stephenson: Sure.

[fol. 367] Mr. Axelrod: We don't deny the necessity. We have taken the position right along that the mudflap, the straight mudflap is the one which we have used. We pre-

fer to use it because of the various reasons outlined to the Court in the evidence.

Judge Briggle: There was some legislation with regard to mudflaps, was there, prior to the 1955 law?

Mr. Husted: There was a '51 law, yes. In Illinois, you mean?

Judge Briggle: Yes.

Mr. Husted: There was one that required the old style apron flap.

Judge Briggle: That was in effect until the '55 Act?

Mr. Husted: That is correct.

Judge Briggle: And that is the type that is used by most trucks at this time for those years, is that right?

Mr. Axelrod: That's correct, Your Honor.

Judge Briggle: Was that the first Act we had in Illinois, 1951?

Mr. Husted: That is correct, Judge Mercer.

Judge Mercer: Prior to that time, we had no law?

Mr. Husted: Had no law at all that I know of. Isn't that right, Mr. Axelrod?

[fol. 368] Mr. Axelrod: I think that's right.

Judge Briggle: All right, gentlemen. You have no objection to those. If you want to introduce them, you may do so.

Mr. Husted: I would prefer to, if Your Honors please.

Judge Briggle: They may be marked Defendants' Exhibits 7, 8 and 9.

Mr. Husted: We are offering Exhibits 1 through 9, inclusive, if Your Honor please.

Judge Briggle: All right. They will be received in evidence, Defendants' Exhibits 1 through 9, inclusive.

(Whereupon, Defendants' Exhibits Nos. 1 through 9 were received in evidence.)

Judge Briggle: Does the Defendant rest?

Mr. Husted: Defendants rest.

Judge Briggle: Anything in rebuttal?

Mr. Axelrod: Yes, Your Honor. We do have a witness in rebuttal.

Judge Briggle: Just one?

Mr. Axelrod: Possibly two, probably one, Your Honor.

(Whereupon, a short recess was had.)

Mr. Axelrod: Your Honor, we just have one witness in rebuttal.

Judge Briggle: You may proceed.

[fol. 369] Mr. Axelrod: Mr. Burke will interrogate Mr. Dolan on rebuttal.

JOSEPH DOLAN called as a rebuttal witness by and in behalf of the Plaintiffs herein, having been previously sworn, was examined and testified as follows:

Direct examination.

By Mr. Burke:

Q. Are you the same Joseph Dolan who was sworn and who testified here yesterday?

A. Yes, I am.

Q. Were you present in the Courtroom when Mr. Eaves testified for the Defendants?

A. Yes, I was.

Q. And did you listen to that testimony carefully?

A. Yes, I did.

Q. I am going to hand to you Exhibits 1 and _, Plaintiffs' Exhibits 1 and 2, about which Mr. Eaves testified yesterday, and ask you to look at them.

First of all, are those your vehicles, your Company's vehicles?

A. Yes, they are.

Q. You are familiar with the installation of the contour flap on those vehicles?

[fol. 370] A. Yes, I am.

Q. You will recall that Mr. Eaves suggested that there was another way to install contour flaps on those vehicles?

A. Yes, I do.

Q. With reference to his suggestions, what is the distance between the surface of the tire and the bottom of the trailer?

A. Approximately five inches.

Q. What is the distance of the top of the mud guard and the bottom of the trailer, the distance between the top of the mudflap and the bottom of the trailer?

A. Approximately two inches.

Q. What is the distance between the surface of the tire and the mudflap?

A. Four to five inches at the top, and possibly three inches at the bottom.

Q. You will recall Mr. Eaves testified that because the mudflap was so close to the bottom of the trailer, it would be broken by the trailer hitting it?

A. Yes, I do.

Q. When the vehicle is loaded, how far from the top of the mudflap is the bottom of the trailer?

A. Approximately two inches.

Q. When the vehicle is unloaded?

[fol. 371] A. Approximately two inches.

Q. Does this vary at all?

A. No.

Q. Why?

A. Because the angle which attaches the contour mudflap to the vehicle itself is supported by that part of the trailer which moves up and down equally with the load of the trailer. In terms of our own business, it is supported on the sub-frame of the trailer, and the sub-frame is attached to the body of the trailer, and the whole of the trailer is supported on the springs, on the axle, and it is the springs which move up and down, or which cause the up and down movement as they are loaded, and the sub-frame to which the contour mudflap is attached will move up and down equally with the body of the trailer.

Q. Do you recall Mr. Eaves suggested that there be five inches between the top of the flap and the bottom of the trailer?

A. I believe that is what he said, yes.

Q. If you put the flap five inches from the bottom of the trailer, what would be the distance between the flap and the surface of the tire?

A. At the other part of the flap, there would possibly be one to two inches, but the bottom of the flap would probably interfere with the tire.

[fol. 372] Q. You will recall Mr. Eaves' testimony that he believed there should be a greater distance between the tire and the flap?

A. Yes, I do.

Mr. Husted: Greater distance than what?

Mr. Burke: Than is pictured there.

Mr. Husted: Oh, I see.

By Mr. Burke:

Q. Do you recall that?

A. Yes, I do.

Q. If you put the flap higher away from the trailer, what would happen?

A. If we put——

Q. (Interposing) Higher away from the surface of the tire?

A. Then, you would interfere with the body of the trailer, when the slide tandem is operated.

Q. In your opinion, therefore, has the space between the tire and the trailer been utilized in the best possible fashion?

Mr. Husted: That calls for a conclusion.

Mr. Burke: Believe the witness has been qualified.

Judge Briggle: From a mechanical standpoint, he may answer what his notion is about it.

The Witness: In view of the difficulties encountered when this type of mudflap is mounted on sliding tandems, [fol. 373] considerable compromise has to be made, and inasmuch as there were some excellent engineers working on the design——

Q. (Interposing) Who installed these mudflaps?

A. Trailmobile, Incorporated.

Q. Did they install them on new equipment or on old equipment?

A. These were installed on brand new trailers.

Q. Who made the trailers?

A. Trailmobile made the trailers.

Q. Would you complete your answer to my question concerning the space between the tire and the bottom of the trailer? I believe I interrupted you.

A. Can I get that question again?

Q. We are talking about the difficulty of moving the flap either closer to the bottom of the trailer or to the sur-

face of the tire, as Mr. Eaves suggested yesterday, and I asked you if you believe that the space available between the tire and the trailer had been utilized in the best possible fashion?

A. I believe I stated, considering the difficulties encountered in mounting contour mudflaps on sliding tandem, I believe that the design engineers of the Trailmobile Corporation did as good a job in compromising this installation as is possible.

Judge Briggle: The photograph, Exhibit 2, that you are [fol. 374] talking about, from a casual observation, would seem to show the mud guards almost in contact with the tires. Is that correct?

The Witness: Yes, Your Honor. That camera angle was affecting that view, however. There is a clearance there of two to three inches.

Judge Briggle: I see. All right.

By Mr. Burke:

Q. I want to direct your attention now away from those two exhibits and to some more testimony by Mr. Eaves.

You will recall his testimony with regard to the contour mudflap. You recall that he said, correcting the statements that you made on the stand yesterday, that in fact the contour flap channeled the air forward of the wheel area. Do you recall that?

A. Yes, I do.

Q. Do you recall——

Mr. Husted: I object to that. Mr. Eaves didn't say that. He said around the wheel area.

Mr. Burke: I will amend my statement.

The Witness: I recall that.

By Mr. Burke:

Q. Do you recall that he suggested that because the contour flap directed the airflow, that the brake drum which you spoke of actually received more air rather than less, as you suggested?

[fol. 375] A. I think that is the point he made, yes, sir.

Q. Do you agree with that statement now in light of his explanation?

A. No, I do not.

Q. Would you just briefly use the blackboard and describe to the Court why you disagree with his airflow conclusion?

Please try, for the purposes of the record, to describe the words of what your picture is.

A. I will have to, because it won't be too clear from the drawing.

What I will attempt to show is the construction of a trailer, and it will not be entirely in correct proportions in combination with the tractor.

This, of course, is entirely out of proportion due to the length of the blackboard. It will be noted that this is a type of vehicle which would have a tractor here which would have two axles. There are also tractors which have three axles, and the trailers which are ordinarily used by the type of company which we represent is a tandem axle trailer in which one set of axle is located directly ahead of the other.

Now, as this trailer proceeds forward at rates of speed from 30, 40 to 50 miles an hour, it can be noted that the main mass of the trailer is entirely above the wheel area. [fol. 376] These wheels are approximately 40 inches in diameter, depending on the size of the tire, and as this entire bulk encounters the air mass, it has a tendency to divide the air mass and blow it in all different directions.

Therefore, it is absolutely impossible to have a direct airflow back through the wheel area.

In addition to this, and as can be noted from the exhibit showing the P. I. E. trailer, there are not only the axles between the wheels on the tractors to break up the airflow underneath the tractor, but there is also what is known as a landing gear construction to support the trailer when it is disengaged from the tractor. In addition, there is the front axle of the tandem assembly which will also break up the airflow before it ever could get into this small area here, which is covered by the contour mudflap.

It is our contention, therefore, and not only a contention, but my own personal knowledge from having worked with design engineers, that a major problem of theirs is to direct airflow in through this wheel area so that the brake temperature can be kept under control.

Q. Now, what is your opinion concerning Mr. Eaves' statement that in fact that mudflap will catch what air that does come back there and direct it to the brake drum?

A. If there were some possibility of that, and of course [fol. 377] it is possible, although I believe improbable——

Q. (Interposing) Why?

A. The affect (sic) of the wheel rotating in this direction, and covered by the contour mud guard, the affect (sic) of the rotation of the wheel would be such as to nullify any current of air that might come between the wheel and the mud guard, and in fact there would be certain speed areas at which this area here would be almost a dead air space.

Q. In the case of a dead air space, what is your conclusion with regard to the affect (sic) that would have on heat dissipation or on the brakes?

A. Since you do have a reduced airflow through the wheel area, it will definitely affect the ability of the cool air to dissipate heat from the brake drum and the brake lining itself.

Q. I hand you, before you walk to the stand, Defendants' Exhibit 5. Will you please examine it, and then show it to the Court.

First of all, is that the entire flap?

A. No, it is not.

Q. Would you show the Court how that part of the flap would fit over the wheel?

A. Well, referring to the pictures, so as to give an idea of the construction of the trailer, this flap, which is approximately 24 inches in width and has flanges on both [fol. 378] sides approximately two or three inches, would fit directly across the tire so that they would cover it laterally.

Q. Now, referring to the test which you took for brake heat, would the results of that test have been the same in your opinion if you had used Defendants' Exhibit 5

rather than your own mudflaps, or the mudflaps that Trailmobile sold you?

A. Yes, they would.

Q. Why?

A. Because the construction of the flap, when it is assembled, will be approximately the same with relation to the wheel as the mudflaps which we used.

Q. Specifically, there are flanges both to the inside and outside of the wheel?

A. That is correct.

Q. On Defendants' Exhibit 5, which is what we are referring to?

A. Yes.

Q. With reference to the motion picture we saw this morning, would the results of your heat test have been the same had you used the plastic or polyethylene flap which was shown in that movie?

A. Yes, they would, because those flaps also have flanges on the inside and outside, and the installation, after in-[fol. 379] stallation the construction would be the same.

Q. Directing your attention now to Mr. Eaves' testimony concerning the tests made by a Dr. Allen, do you recall his testimony?

A. Yes, I do.

Q. Do you recall that he testified that those tests were taken under wind conditions of no more than three or four miles per hour?

A. I believe that was the figure he used, yes.

Q. Would such a test, therefore, take into consideration the airflow that would exist when the vehicle is moving on the road?

A. No, it would not.

Q. What would the difference of airflow be with regard to splash or spray?

Mr. Husted: If Your Honor please, the witness is contradicting himself. He claims there isn't any airflow coming under the bottom of these trucks, or that there is very little.

Mr. Burke: We are discussing now the windflow on the side of the truck as it moves, not the windflow between the mudflap and wheel about which he just testified.

Mr. Husted: The windflow on the side of the truck is immaterial. These aren't put on the side; they are put on the rear end behind the wheel.

[fol. 380] Mr. Burke: With regard to the question, I will restate it.

Q. What affect (sic) would the air flow have in normal driving conditions on the spray from the rear wheels of a trailer which the contour mudflap is supposed to correct or improve or make better?

A. Since it is purported that the contour mudflap will restrain or diminish the side spray to the outside of the vehicle, the airflow along the outside of the vehicle is certainly most important consideration in determining the results of any test. If the test were conducted when the vehicle was not in motion, it would be impossible to determine what the results would be when the vehicle was actually operated over the road. The only possible way in which such results could be even estimated would be with scale models and a wind tunnel.

Q. Directing your attention next to Mr. Eaves' testimony concerning the fact that a contour mudflap in his opinion will do a better job of catching gravel and stones, do you agree?

A. No, I do not.

Q. Again, just briefly using the blackboard, would you show why you disagree?

A. Yes, I can.

[fol. 381] Q. Please.

Mr. Husted: Excuse me. A better job than what, Mr. Burke?

Mr. Burke: A better job than is done by the present conventional mudflaps.

Mr. Husted: I reinstate my oft-stated objections that the old style conventional flaps are not in issue here. There is nothing in the Illinois law to require this use if this mudflap is bad. The issue here is contour mudflaps versus no mudflaps.

Mr. Stephenson: That isn't the issue in this case, Your Honor.

Mr. Axelrod: We don't see that as the issue at all.

Judge Briggle: That goes to the question of safety, doesn't it? The comparison between the flap previously used and the contour flap enters into the question of safety, doesn't it?

Mr. Husted: I think not, Your Honor. I can't see any connection.

Judge Briggle: I think the objection will be overruled.

By Mr. Burke:

Q. Please describe for us why you disagree with Mr. Eaves' statement?

A. Because of lack of space on the blackboard, I will attempt to show only the rear area of a trailer as it would [fol. 382] be constructed and as it would show going down the highway.

Judge Briggle: That is a side view?

The Witness: This is a side view of the trailer, Your Honor, with the direction of movement thusly.

The contour mudflap would be installed in approximately this manner with a straight rubber or other material flap protruding from the center line of this axle to an area, to a distance not to be greater than ten inches from the surface of the road in this area here.

If a standard or conventional mudflap were to be installed on the trailer in accordance with the recommendations of the Society of Automotive Engineers, it would be hung at the fartherest extreme possible point at the rear of the trailer.

Taking both of these distances from the ground as being the same, when a rock is thrown out from under the wheel, if it comes back at this angle, and it can be seen here that the angle can be rather steep, the rock would be thrown back from the wheel, would miss the protection of the contour mudflap since it is this close to the wheel, but it would be caught by the conventional mudflap since it is far enough back. Even though it is the same distance from the ground, the angle at which the rock is thrown [fol. 383] would increase, or the distance would increase due to the angle, so that it would be caught by the conventional mudflap.

It is for this reason that you would receive added protection and greater efficiency in controlling rearward throw of material from the straight mudflap as compared with the contour mudflap. It would give greater protection to cars immediately following this vehicle.

It is for this reason that the Society of Automotive Engineers recommends that the flap be installed in this position.

Mr. Burke: Thank you.

Mr. Husted: I object to that statement as to what the Society of Automotive Engineers recommends. That is completely hearsay, Your Honor. That hasn't been offered in testimony. There hasn't been any testimony as to that.

Mr. Burke: That was read into the record, Your Honor, yesterday from the handbook.

Judge Briggle: Let it stand subject to the objection. Go ahead. Is that all of this witness?

Mr. Burke: I have just two short series of questions.

Q. The first one, most of the Plaintiffs' testimony yesterday with regard to the affect (sic) of blow out on a mudflap appeared to be directed only toward the metal mud- [fol. 384] flap. What would be the affect (sic) of a blow out on a flexible contour mudflap, realizing that it isn't the blow out that causes the difficulty?

A. That is our point, which I am sure has been completely brought out.

It is not the direct affect (sic) of the blow out itself blowing against the mudflap that we feel is the major consideration in tearing it off, but when one of these tires does blow out, it has a tendency to pull this thread loose from the cord of the tire, and as such it flops loose and can catch the contour mudflap.

Now, since the law gives the dimension within which the contour mudflap must be mounted from the surface of the tire, and that dimension was six inches, no matter whether it was made of steel or whether it were made of rubber or plastic, the wheel turning at the high rpm or high revolution it does by traveling at 40 to 50 miles an hour, with the tremendous force generated at that high speed, if that tire were to catch the contour mudflap made of any ma-

terial it would either tear it off or would double it back up under the trailer.

Q. Do you recall Mr. Eaves' testimony yesterday regarding the life expectancy of contour mudflaps manufactured by his company?

A. Yes, I do.

[fol. 385] Q. Have you ever spoken to Mr. Eaves on this subject, life expectancy of his products, before?

A. Yes, I have.

Q. When and under what circumstances?

A. Oh, on approximately December 1st, Mr. Eaves——

Q. (Interposing) What year, please?

A. 1957. Mr. Eaves called me to discuss the mudflaps which were manufactured by his company.

Q. What representations did he make to you at that time concerning their life expectancy?

Mr. Husted: I object to that. This is all hearsay.

Mr. Burke: Your Honor, Mr. Eaves is in the Courtroom, and I am trying to show a prior contradictory statement.

Mr. Husted: Mr. Eaves is not a party to this suit.

Mr. Burke: He is a witness.

Mr. Husted: That doesn't put this kind of a conversation material.

Mr. Burke: I am seeking to attack the credibility of the witness, and I believe the evidence is relevant because it has been Plaintiffs' contention throughout that these do not last, and that they fall off.

Judge Briggle: He may answer.

By Mr. Burke:

Q. What was the representation to you concerning the life expectancy of his product?

A. It was Mr. Eaves' statement to me that in his opinion [fol. 386] within a year we would have replaced all of our contour mudflaps anyhow.

Mr. Burke: Thank you. Your witness.

Judge Briggle: You may cross examine.

Cross examination.

By Mr. Husted:

Q. Mr. Dolan, on this drawing that you have here, is there any reason why this cannot be extended downward so as to catch this flow?

A. It could be extended clear down to where it would drag on the ground.

Q. And still be in compliance with the law?

A. That's correct.

Q. They don't have to?

A. No. But it would increase the possibility of losing them.

Q. I would agree with you. By the same token, if this were extended down until it reached the ground, it would increase the likelihood of that being torn off, would it not?

A. That is correct.

Q. And what is the angle of throw from the hypothenuse line, a level strip of roadway?

A. The angle of throw begins from an angle of even one [fol. 387] degree and will continue clear up to the upper 90 degrees of the wheel.

Q. Well, that coming off at this point where this is the apex, it does not exceed 22 degrees, is that not correct?

A. I don't believe that that can be stated definitely, because the tests which are about to be conducted to show what amount that is by the Franklin Institute are not yet complete.

Q. Well, do you know what that angle is?

A. Of what?

Q. The angle of throw from this point here? It will be kept within what tangent or what angle?

A. I cannot say.

Q. Now, it is true, is it not, Mr. Dolan, that these rear flaps or aprons of this old style have a tendency, if the vehicle is moving, to sail back more like that than like this, do they not?

A. It can be controlled to a considerable degree, depending on the mounting.

Q. Well, I am talking about the kind that you have described where there is no mounting, there is no rigidity?

You have talked about "flexible" throughout this case, you and your Confederates.

A. There is an important consideration along that [fol. 388] line.

Q. I mean no disparagement by that term. Your associates, I should say.

A. Yes. There is a very definite relationship between the amount to which that flap will sail and the manner in which it is mounted on the trailer.

Q. Now, of course, the particular drawing that you made is gone, but you had a drawing that showed the little support wheel?

A. Yes, sir.

Q. Now, actually, when the truck is in operation, that folds up against the floor of the body, or up in the area somewhere, doesn't it? It does not protrude downward?

A. No, sir. It does not fold up; it does protrude downward.

Q. Is it a solid piece of equipment, or is it one of bars that through which and over and around airflow would flow?

A. One of bars and structural angles.

Q. And isn't that the same thing which is true of the axle that goes through here, from the axle up to the bed they are not solid, are they?

A. The under construction of a tandem is almost a solid mass from the axle up to the trailer itself.

[fol. 389] Q. So that you say air cannot pass down through there?

A. I do not say that. I say that the airflow becomes a major design problem due to the fact that all of these things do exist, and that every effort has to be made to attempt to get some air to the brake area.

Q. Well, there is no more of a solid mass—strike that, please, Mr. Reporter.

The changing or interchanging of the rear splash guards from one type to another, or the removal of both so that there are none at all, have no relation whatever to the amount of air that comes through and over the rear wheels and tires?

A. Yes, I believe there is.

Q. Well, will you tell me why?

A. Yes. I can do it better with some drawings or pictures, possibly.

Q. Let me follow that up with another question.

Mr. Axelrod: Let the witness answer this question, if the witness is ready to do it. I submit it ought to be answered.

Mr. Husted: Well, I can withdraw the question, I believe.

Judge Briggle: Put whatever question you wish.

By Mr. Husted:

Q. The air that comes, that is obstructed by the axles [fol. 390] and these front wheels and the portion of the truck generally termed the undercarriage, is not influenced, is it, by what is hanging behind the truck?

A. Yes, I believe it is. The point that I was establishing is that the airflow coming back under the trailer cannot come back in a smooth stream because of the various obstructions it encounters under the trailer.

When the trailer is moving forward at a rate of speed as I say of anywhere from 30 to 50 miles or even less, a turbulence is created, and that is the important consideration, the turbulence that is created by the various axles under the carriage and etc., and I do not say there is no airflow to the brake drum area whatsoever, because, if that were true, there could be no cooling of the brake drum at all.

But, the airflow is definitely restricted and reduced, and turbulence which these various masses create causes a major problem in directing airflow to the brake drum.

Now, what airflow does come back to that area will strike the contour mudflaps, since it does have a somewhat shrouding affect (sic) on the upper 90 degrees of that rear wheel, and causes what might be called a ram effect. In other words, the air will come back and hit that and have the tendency to bounce back and kill the airflow that would [fol. 391] ordinarily come through there if there were no contour flap there.

Q. It's your contention that the forward movement of

this vehicle would not permit air, whatever passes through these axles and past these brace wheels, would not permit that to go right on down through there?

A. That is my contention, and that relates only to the air which is directly between the wheel and the contour mudflap. The friction generated on the air by the surface of the tire as it turns in the opposite direction will tend to nullify any force which is moving the air downward through the chute created between the tire and the mudflap.

Q. I see. You don't contend, do you, Mr. Dolan, that this type of splash guard in no way deflects or minimizes wheel splash of mud and water?

A. No, sir.

Q. You do not contend that?

A. No, sir.

Q. You contend that this is better, but you don't contend that this is completely ineffective, is that correct?

A. We could put a piece of paper up there and it would deflect some.

Q. It would do some?

[fol. 392] A. Yes.

Mr. Husted: That is all.

Judge Mercer: Mr. Dolan, does the contour splash guard consist of flexible material?

The Witness: There are types on the market such as this guard shown here, Your Honor, which is flexible material.

Judge Mercer: And does the contour splash guard hang perpendicularly at right angles to the body of the vehicle?

The Witness: Not in the upper 90 degrees, no, sir.

Judge Mercer: And does the contour splash guard hang parallel with the rearmost axle?

The Witness: No, Your Honor, it does not.

Judge Mercer: That is all.

Judge Briggle: Mr. Dolan, reference has been made throughout this proceeding to sliding tandems. Now, I don't know what they are. I guess these other Judges probably do, but will you tell me in a few words what the operation of a sliding tandem is?

The Witness: Yes, Your Honor, if I can refer to these pictures here.

Mr. Axelrod: Refer to them by number, please, sir.

The Witness: Exhibits 1 and 2, Plaintiffs' Exhibits 1 and 2.

[fol. 393] Judge Briggle: All right, I have them.

The Witness: Due to the weight laws by the various states, we are generally controlled so that we may have no more than 18,000 pounds gross weight on each one of these axles.

Now, as we load one of our trailers, we may find that the trailer's axles would have a load of 19,000 pounds on it. Now, if we were able to slide this tandem farther toward the rear of the trailer, that would throw a greater amount of weight on the axles of the tractor which pulls the trailer down the road.

Judge Briggle: And the tandem is the arrangement of the wheels?

The Witness: Is the arrangement of the wheels, which is shown in this construction here, these springs, axles, this means of connecting the two axles, and this area in here is known as the sub-frame.

Now, this pin which is shown across here is withdrawn. The brakes here are locked, and then the tractor is used to slide the upper portion, the body of the trailer, either forward or back to effect the relationship of this tandem assembly either forward or to the rear.

Judge Briggle: And the purpose is for distribution of the wheels?

The Witness: Yes, sir.

[fol. 394] Judge Briggle: Are there any other questions of this witness?

Mr. Husted: That is all, as far as we are concerned.

Mr. Burke: That is all.

(Witness excused.)

Judge Briggle: Anything further for Plaintiff?

Mr. Axelrod: No further rebuttal.

Judge Briggle: Anything further for Defendants?

Mr. Husted: Nothing further.

Judge Briggle: The evidence is closed. How much time would you gentlemen desire?

(Whereupon, a short discussion was had as to length of time to be allotted for arguments.)

Judge Briggle: I think we would like to hear short argument.

Mr. Axelrod: I am ready, Your Honor.

Judge Briggle: I said short advisedly. Is that agreeable with you?

Mr. Husted: Yes.

Judge Briggle: We'll hear your opening now, Mr. Axelrod, or whoever is to present it. Suppose we hear one argument for your side.

Mr. Stephenson: I have three paragraphs is all I have.

[fol. 395] Judge Briggle: All right.

ARGUMENT OF MR. STEPHENSON

Mr. Stephenson: If it please the Court, it is clear that unless the Act now in issue can be justified as a legitimate exercise of the police power of the State of Illinois, it is a usurpation of power vested exclusively in Congress. Whatever may be the power of Illinois over commerce, that is wholly internal. It can no more prohibit or regulate interstate commerce than it can prohibit or regulate commerce with foreign nations. Power over interstate commerce is given by the constitution to Congress in the same words in which it is given over commerce with foreign nations. In both cases, it is exclusive.

Admittedly, the delegation to Congress of the power to regulate interstate commerce was not a surrender of what may be called as the police power of a state. It is difficult to define with exactness or precision what that power is. But whatever may be the nature and scope of the police power of a state, it cannot be exercised over a subject given exclusively to Congress.

Illinois may not under the guise of exerting its police power substantially burden interstate commerce. The testimony and evidence adduced at this hearing have pointedly demonstrated that the effect of the Act now in issue is to obstruct and burden the exercise of the privilege of engaging in interstate commerce.

[fol. 396] In the case of Railroad Company vs. Husen, 95 U. S. 465 at page 473, the Court states: "The police power of a state cannot obstruct foreign commerce or interstate commerce beyond the necessity for its exercise, and under color of the objects not within its scope cannot be secured at the expense of the protection afforded by the Federal Constitution. And as its range sometimes comes very near to the field committed by the constitution to Congress, it is the duty of the Courts to guard vigilantly against any needless intrusion."

It is submitted that the principle enunciated in that case, the Husen case is very vital here today. The effect of the Illinois Act now at issue is to obstruct and clog interstate commerce as it exists between the states at the present time.

For that reason, this Act should be held unconstitutional. Thank you.

ARGUMENT OF MR. AXELROD

Mr. Axelrod: May it please the Court, we rely principally upon the case of Southern Pacific versus Arizona reported in 325 U. S. 761. Very briefly, in that case, and I pointed that out to Judge Briggle and also to Mr. Husted when we were here on the temporary restraining order, in that case the State of Arizona passed a statute which made it unlawful for a railroad train of more than 14 passengers or 70 freight cars to operate through the State [fol. 397] of Arizona. The Supreme Court, in its decision, asks the question which was involved on this basis, whether the Statute contravened the commerce clause of the Federal Constitution.

The Arizona Supreme Court held the Statute valid and held it valid on the basis of the Act being a safety measure. However, the Supreme Court of the United States reversed the case, and we submit it is the law which controls our case before Your Honors this morning.

I'd like to briefly quote from that decision: "But ever since Giffin vs. Ogden the State has not been deemed to have authority to impede substantially the free flow of commerce from state to state or to regulate those phases of national commerce which, because of the need of national

uniformity, demand that their regulation, if any, be prescribed by a single authority.

"For a hundred years it has been accepted constitutional doctrine that the commerce clause, without the aid of congressional legislation, thus affords some protection from the state legislation inimicable to the national commerce, and that in such cases where Congress has not acted, this Court and not the State Legislature is under the commerce clause the final arbitrator of the competing demands of state and national interest."

The Supreme Court went on to make specific findings [fol. 398] of fact in support of its holding in the Arizona case, but the language applicable again is this: "If one state may regulate train lengths, so may all the others, and they need not prescribe the same maximum limitation. The practical effect of such regulation is to control train operations beyond the boundaries of the state, exacting it because of the necessity of breaking up and reassembling long trains at the nearest terminal points before entering and after leaving the regulating state. This serious impediment to the free flow of commerce by the local regulation of train length and the practical necessity of such regulation, if any, must be prescribed by a single body having a national-wide authority are apparent.

"We think," said the Supreme Court, "that the law viewed as a safety measure affords at most slight and dubious advantage, if any, over unregulated train lengths. Its undoubted affect (sic) on the commerce is the regulation without securing uniformity of the length of trains operated in interstate commerce which even is itself a primary cause of preventing the free flow of commerce by delaying it and by substantially increasing its cost and impairing its efficiency."

Relying upon another case of Kelly vs. Washington, the Supreme Court in the Arizona case, which involved in the [fol. 399] Kelly case a Statute which was very specific, the Supreme Court in the Arizona case in citing the Kelly case then concluded: "Here we conclude that the state goes too far. Its regulation of train lengths admittedly obstructed interstate train operation and, having a seriously adverse affect (sic) on transportation efficiency and econ-

omy, passes beyond what is plainly essential for safety, since it does not appear that it will lessen rather than increase the danger of accidents. Its attempted regulation of the operation of interstate trains cannot establish nation-wide control such as is essential to the maintenance of an efficient transportation system. The state interest cannot be preserved at the expense of the national interest by an enactment which regulates interstate train lengths without securing such control, which is a matter of national concern.

"Here," said the Court concluding, "an examination of all of the facts makes it plain that the state interest is outweighed by the interest of the nation in an adequate, economical and efficient railway transportation service which must prevail."

In this case, Your Honor, we have a very specific Statute. It's one which the Courts talk about as a Statute which is described with specificity, and I submit that where a Statute attempts that kind of a description, it should be [fol. 400] viewed with much more skepticism by a Court, particularly because of its attempt to set forth only the specific kind of an appliance, such as this contour mud guard is described under the Illinois Statute.

I submit that this Court, because of that very fact, ought to more skeptically look upon the Statute in question.

We have shown Your Honors in the evidence, I submit, that here this Statute unduly and unreasonably burdens interstate commerce. We have shown how the interchange of traffic between motor carriers, which is the life blood of their operations, and which is the manner and method by which for many years both carriers have conducted a service pursuant to certificates granted to them by the I.C.C., would either be lost, if not lost it would be delayed, if not delayed certainly it would be obstructed, and, if not obstructed, definitely it would impair the efficiency of the kind of service which motor carriers are required to give pursuant to their certificates.

We pointed out that these carriers operated under certificates which require that they render reasonably adequate service to the public, and failing that, penalty in the form of revocation of their operating authorities could result.

[fol. 401] These carriers are under duty to handle traffic tendered to them by connecting carriers, whether it be explosives traffic or whether it be perishable traffic, and for failure to provide a service which they could not provide by reason of the difficulties which could be encountered, and having a trailer originating in the State of Washington, passing into Illinois, because the carrier in Washington didn't have the contour flap on that trailer.

We have shown in this instance, Your Honors, that there would be a substantial and unreasonable burden placed upon these Plaintiffs, first, in the cost, secondly, in the maintenance. But, we say that that is a fact which wouldn't have any compensating advantages to it. If, on the other hand, the safety improvement would compensate for that, we would submit that we should be required to assume additional financial burdens. But, where it has been shown that there is no corresponding safety improvement, then, I submit the financial burdens which we would be assuming are significant from the standpoint of unreasonably and unduly burdening interstate commerce.

Particularly, I'd like to call attention again to the specificity with which this Statute described the contour mudflap. It is described in such a way that only a particular kind of manufactured product can be used. And, if the [fol. 402] State of Illinois has the right lawfully to prescribe only a particular kind and product, then, every other state in the United States has the same right, and every other state in the United States could, for its determination that the specificity of the Illinois Statute shall not be theirs, but that they would write in different specifications for this contour mudflap. It is this which is vital from the standpoint of the obstruction question.

As pointed out by the witness for Mr. Stephenson, Arkansas-Best, that carrier, under the circumstances, would be between the "devil and the deep blue sea" in its operations between Illinois and Arkansas. But, if this State is good, then, other states can do the same thing, and we would have a destruction of interstate commerce.

Judge Briggle: Do any of the other states presently have contour?

Mr. Axelrod: We take the position that the answer to that, Your Honor, is "No," and we have established by the testimony of the witnesses, particularly of D.C. that although the state alleges in its answer that Idaho and Oregon have similar Statutes, we submit that the evidence in the case shows "No," and we submit that no state in the United States has a contour mudflap statute requirement such as the Illinois Statute is. All other states we have alleged in the complaint require either the conventional straight [fol. 403] or none at all; and we have indicated that I think it's 25 states do have, some states do not. There are other reasons for that, but I think that answered the question you asked, Judge Briggle.

Judge Mercer: Disregarding the question of expense, what is the feasibility of attaching contour guards at state lines and removing the contour guards after crossing the State of Illinois?

Mr. Axelrod: I think it's the most impracticable, unoperative problem that could be presented to any efficient interstate service.

Judge Mercer: Why?

Mr. Axelrod: If a carrier, it would amount to a roadblock, Your Honor. If the state could require a carrier to stop and equip when it entered the state, and then take it off when it left the state, because, for example, in the next state it would be illegal, such as between Arkansas and Illinois, and then come back and forth, and do the same thing, that is the very thing which we contend is the obstruction to interstate commerce.

Judge Mercer: The obstruction would be in delay, principally, wouldn't it?

Mr. Axelrod: The obstruction would be in delay with respect to the efficiency of the service which is contemplated to be provided by the motor carriers in the interest [fol. 404] of national transportation policy, which contemplates defense.

For example, these carriers are handling explosives, and they did handle a substantial amount of it, as the witness from Washington indicated, during the war.

The importance of time was all important in the transportation of explosives. To stop, and of course in those

instances we have indicated that those trailers couldn't even put them on because they couldn't weld or put anything on there that would require any welding process or any attachment process where any contact would be made with a cargo of explosives, but I submit, Your Honor, that that would be an impossible type of operation from the standpoint of conducting an efficient interstate service pursuant to the transportation policy of the act.

It is that very thing which I see the Arizona case held was the problem and why the Supreme Court struck down the Arizona law.

Judge Mercer: There was a decision there that would have involved the cutting out of certain cars in the train and leaving them there.

Mr. Axelrod: Yes, that's correct, Your Honor.

Judge Mercer: And then going across the State of Ari-
[fol. 405] zona with a certain number of cars.

Mr. Axelrod: And then following it, and there you have the question of delay, Your Honor, and the Supreme Court in the decision talks about efficiency of service and delay.

But we take the position, Your Honors, that where all of that is shown, the diseefficiency or the failure to provide the efficient service sould (sic) result, and where correspondingly there are other disadvantages, and we have attempted to show here that these appliances are unsafe, we take the position that they create hazards, much greater than do they improve, if any, the safety feature, and we have double barreled our attack on that ground, too.

We submit, that when you couple the obstruction, the burden and the unreasonable requirements with the fact that the flaps are not safe, but in fact are unsafe, that that combination would require discord, to look with a great deal of skepticism upon this law and in the interest of interstate commerce knock down this statute.

Judge Mercer: Of course, you understand that the State of Illinois has a police power?

Mr. Axelrod: There is no doubt about it, Your Honor. It has the police power, and the police power is good subject only to its burdening or obstructing unreasonably interstate commerce.

[fol. 406] Judge Mercer: Do you think this is a matter of weighing the alleged burden and obstruction to commerce against the police power of Illinois?

Mr. Axelrod: I think it's a matter of determining on the facts here whether or not there is the undue burden and the obstruction. I think we have shown it. I think we have shown that our operating efficiency and the service which we render would be impaired, lost or destroyed, and that means service to the public, which is a part.

It's the public that we are concerned with when the constitution guarantees a free flow of interstate commerce. It's the right of the carrier to engage in interstate commerce for the benefit of the public using that service. Where that is shown, I submit, and where on the opposite there is very little if any advantage shown in connection with a safety appliance, that safety appliance should fall.

On that score, the Arizona case and the Supreme Court case said this: "The decisive question is whether the total effect of the law in reducing accidents is so slight or problematical as not to outweigh the national interest in keeping interstate commerce free from interference, and that a law that affords only slight or dubious advantage, and where its effect is to delay the free flow [fol. 407] of commerce, to increase its cost, to impair its efficiency, that law should be struck down in the interest of interstate commerce."

Judge Mercer: Is this Arizona case the last pronouncement in the Supreme Court?

Mr. Axelrod: I think it is on this subject, Your Honor. We submit that it's controlling law at this point.

Judge Mercer: Of course, there are some dissenting opinions in that case?

Mr. Axelrod: Yes; there were, Your Honor.

Judge Briggle: We'll recess, gentlemen, and come back at 1:30 and hear you, Mr. Husted. Court will be in recess until 1:30.

(Whereupon, the hearing in the above-entitled cause was adjourned until 1:30 P. M. of the same day.)

[fol. 408] Afternoon Session

Judge Briggle: We will hear you for Defense, gentlemen.

Mr. Husted: May it please the Court.

Judge Briggle: Mr. Husted.

ARGUMENT OF MR. HUSTED

Mr. Husted: At the outset, if Your Honors please, I would like to restate the Defendants' theory that the Court here is interested only in whether or not the statutorily provided and required splash guards bear a reasonable relation to the accomplishment of the purpose for which they were designed or provided by the Legislature. I say that for the reason that nowhere in either the proof or more fundamental than that, in the pleadings, is this Statute challenged as being discriminatory of intrastate commerce. There is no challenge that Congress has either preempted or entered the field. We don't have those questions before the Court.

All that the Court has is the question of whether or not this Statute bears a reasonable relation to safety to the purpose for which it was enacted. The purpose is expressed in the Statute. It is to minimize, insofar as it is practicable, a rear and side splash and throw from vehicles of the second division using the highways of Illinois.

Judge Briggle: You mean to say that we are not con-
[fol. 409] cerned with any possible burden on interstate commerce?

Mr. Husted: No. It is in relation to that problem that I said it, if Your Honor please, that I think that the law, I should demonstrate that the law is that if this Statute does bear a reasonable relation to safety, notwithstanding that, it may be some inconvenience to the interstate operators.

Judge Briggle: I see.

Mr. Husted: Of course any police power regulation involves some inconvenience, cost, damage or other impediment to the commerce.

Now, Mr. Axelrod has brought to the attention of the

Court two cases, both railroad cases, and has stated to the Court that he relies principally on this 325 U. S. case, that is the Zrizona (sic) Short Train Limitation Case.

I would call the Court's attention to the case of Maurer vs. Hamilton reported in 309 US at page 598, specifically calling the attention of the Court to page 604.

Here, the Supreme Court of the United States has set forth the basic fundamental difference between the approach to a railroad problem and a state highway problem.

The Court says, and I am reading verbatim:

"Our most extensive experience had been in the national [fol. 410] regulation of rail carriers, operating over roads and with rolling stock privately owned and controlled, with standards of roadbed, operation and equipment, substantially uniform throughout the country, and with the movement of traffic on each road subject to a single unified control.

"Regulation of vehicular traffic over the highways of the United States involved a far more varied and complex undertaking. The highways of the country have been built by the states with substantial financial aid from the federal government in the construction of some of them. They are state owned, and, in general, are open in each state to use by privately owned and controlled motor vehicles of widely different character as respects weight, size, and equipment. The width, grades, curves, weight-bearing capacity, surfacing and overhead obstructions of the highways differed widely in the forty-eight different states and in different sections of each state. There are like variations with respect to congestion of traffic. State regulation, deverloped (sic) over a period of years, has been directed to the safe and convenient use [fol. 411] of the highways and their conservation with reference to varying local needs and conditions.

"Assumption of national control involved problems of peculiar difficulty and delicacy. Apart from regulations of interstate motor traffic having commercial aims and involving routes, schedules, rates and the like, any regulation on a national scale, whatever its extent, has an intimate and vital relation to the conservation of highways which belong to the states, and to their safe and

convenient use by the general public in both interstate and intrastate traffic. Our entire experience with the growth of automobile traffic and its regulation by the states teaches that in any form of non-commercial regulation, safety is a dominant consideration. Motor vehicles are dangerous machines whose operation is attended by serious hazard to the persons and property."

It gives the citation.

"In 1934, the year before the enactment of the Motor Carrier Act, there were 36,000 reported deaths from motor car accidents in the United States. Excessive speed, defective appliances, negligent driving, size, weight and load-[fol. 412] ing of cars in conjunction with local conditions of traffic and of the highways, contributed in varying degrees to this record of disaster."

Now, this was in 1939. I wonder what Mr. Justice Stone would have to say about the traffic problem today.

Judge Mercer: What question was raised in this particular case?

Mr. Husted: The question here, Your Honor, was the propriety of a Pennsylvania Statute which forbad the hauling of an automobile on an automobile carrier truck over the head of the cab or of the driver.

It was contended that this was an invasion of interstate commerce because motor vehicles carried on other motor vehicles, for the most part, are interstate operation.

It was contended that this was the invasion of the function of Congress, and even though Congress has entered the field in 1935, there was a reservation, so, this Court held of size and weight regulations to the states, and they held the Statute good.

Judge Briggle: What was the contention there? In what respect did it burden interstate commerce?

Mr. Husted: Well, there, the Plaintiffs contended that they could safely haul, could safely haul a car up over [fol. 413] the cab of the truck, and they contended they could do so in other states, and that was true.

Judge Briggle: I wondered what they contended in what fashion it interfered with the interstate commerce operation?

Mr. Husted: Because it required them to drive their

trucks over the highways of Pennsylvania with one spot on their outfits empty, the one over the cab of the truck.

Now, I use that case principally to show the basic, fundamental difference in approach to a railroad case on the one hand, as this case points out, where the equipment, roadbed, operational problems are substantially the same over all of the states of the United States.

With that thought in mind, let us take a look at this case upon which Plaintiffs principally rely, the Southern Pacific Company vs. Arizona. That is the short train case.

There, the trial Court made certain findings of fact. One of them was this, and I am reading from page 775 of that opinion:

"The trial Court found that the Arizona law had no reasonable relation to safety, and made train operations more dangerous."

Now, that was the finding of the Court that it bore no reasonable relation to safety, but that it made train [fol. 414] operation more dangerous, and I wondered when I first read that case what that meant. Proceeding farther to page 777, we find language which at first blush has the appearance of being a witticism:

"As the trial Court found, reduction of the length of trains also tends to increase the number of accidents because of the increase in the number of trains."

Well, under that circumstance, if Your Honors please, if the trial Court found and the reviewing Court adopted the findings of that Court that not only the Statute bore no reasonable relation to safety, but that on the contrary it caused the companies to operate more trains, and that there was a direct ratio between the number of trains and the number of accidents, and therefore this Statute actually promoted accidents or was likely to, is it conceivable that any court anywhere would sustain this Statute? I submit that no Court under that finding could sustain this Statute.

Judge Briggle: The Supreme Court of Arizona did. The findings you are reading are from the trial Court.

Mr. Husted: From the trial Court.

Judge Briggle: And the Supreme Court overruled the trial Court, didn't they, the Supreme Court of Arizona?

Mr. Husted: I don't think so.

[fol. 415] Judge Briggle: They must have, or they probably wouldn't have gotten to the Supreme Court. I don't know what the Supreme Court of Arizona said about those findings, but they overruled the trial Court, I think.

Mr. Husted: You are correct, that's right. The Supreme Court, the Supreme Court held the Act good, the Supreme Court of the United States, on this reasoning, held it bad.

Well, I agree, perhaps, the Supreme Court of Arizona did that, but to me it's inconceivable on that finding that they would do so, and it's certainly not surprising that the Court was reversed.

Judge Major: But after all, that case turns largely, does it not, upon the burden which was imposed upon interstate commerce?

Mr. Husted: Well, yes. It, of course, was a burden. They had to cut down the size of their trains before they could enter the state.

Judge Major: Well, is it your theory that a legislature has greater lattitude (sic) in imposing a burden on commerce as it concerns the operation of motor vehicles in contrast to a railroad?

Mr. Husted: No, not exactly.

Judge Major: Your argument gets pretty close to it, [fol. 416] doesn't it?

Mr. Husted: Gets pretty close to it, Judge, but you have this distinction, that on railroad cases you have a problem that the uniform regulation or law adopted by Congress, or by the Interstate Commerce Commission, would necessarily work more conveniently because of the uniformity in the type of operations of railroads than it would on the use of highways in the various states.

To give a specific example, Arizona, for instance, has no splash guard law. I dare say they never will have any more than Illinois will have a sand storm equipment regulation. Why, because of the difference in the nature.

Now, that is not true of railroads. They are pretty much the same the country over, and I submit that while this may be a late pronouncement by the Supreme Court of the United States insofar as railroads are concerned, that it has no bearing on our particular problem. In fact, the

same rule is used. The trial Court found that the Statute bore no reasonable relation to the safety of the operation of trains, and that was the purpose of the Statute.

The Defendants, if Your Honors please, rely principally on the Barnwell case, which in our opinion is much closer [fol. 417] in point of fact to the problem at hand than is the Arizona case. It is at least a highway case.

Judge Briggle: Is that the case—. What is the citation of that, please?

Mr. Husted: 303 US 161—excuse me, 177.

This case, this Barnwell case involves the constitutional validity of the weight and width regulations for trucks of the State of South Carolina. A District Court of three Judges held that the weight and width prohibitions placed an unlawful burden on interstate motor traffic and issued an injunction enjoining the enforcement of the Statute.

I call the Court's attention to page 181 of that case. There there is a relation that the trial Court rested its decision that the Statute unreasonably burdens interstate commerce, upon findings, not assailed here, that there is a large amount of motor truck traffic passing interstate in the southeastern part of the United States, which would normally pass over the highways of South Carolina, but which will be barred from the state by the challenged restrictions if enforced, and upon its conclusion that, when viewed in the light of their effect upon interstate commerce, these restrictions are unreasonable.

Now, this width regulation of 90 inches for trucks was [fol. 418] one that absolutely the truckers could not comply with if they had a standard truck, that is, there was no way that they could stop at the boundaries of the state and slice six inches off the side of the truck any more than you can slice six feet off the side of this building without damaging and ruining the truck.

Judge Mercer: They could regulate the length, couldn't they, the truckers, by tandem?

Mr. Husted: Yes, yes. They could do that. They could comply with that, but there is no way they could this width regulation; physically impossible. No one could challenge that.

While the constitutional grant of Congress of power to regulate interstate commerce has been held to operate of its own force to curtail state power in some measure, it did not forestall some regulation. This is on the question that Mr. Axelrod brought to the attention of the Court that the commerce clause, standing alone without any congressional action, is some protection.

I submit that that is of some protection only in a case of discrimination, and admittedly there is no discrimination in the Splash Guard Act.

Judge Major: The Arizona case, they relied solely on the commerce clause, didn't they, the Arizona train case [fol. 419] you just talked about?

Mr. Husted: Yes.

Judge Major: If they can rely solely on the commerce clause in that case, why can't they do it in this case, unless there is a difference between railroad transportation and motor transportation?

Mr. Husted: Well, I didn't get what you were driving at a while ago. If you get to the question of what has been reserved to the states by non-action of Congress, there is a vast difference between the volume of questions that have been reserved to the states in vehicular regulations than there are in train operations. They have pretty well preempted the field in train regulation.

Judge Major: Has there been any power reserved to the states to obstruct commerce in a case like this?

Mr. Husted: No, of course not. None to obstruct commerce?

Judge Major: Yes, or place a burden on commerce?

Mr. Husted: Oh, yes, very definitely. That is what this case points out very cogently, Judge Major.

I am reading from 185:

"The commerce clause, by its own force, prohibits discrimination against interstate commerce, whatever its form or method, and the decisions of this Court have recognized [fol. 420] that there is scope for its like operation when state legislation nominally of local concern is in point of fact aimed at interstate commerce, or by its necessary operation is a means of gaining a local benefit by throwing the attendant burdens on those without the state."

Now, obviously, this Statute does not do that. The operation is alike on all operators that are within the scope of its provisions, whether they are interstate or intrastate. If they have a truck, the body frame and floor construction of which obviates the necessity of fenders, they don't have to have them, and that is true whether it's interstate or intrastate. If they don't have that means of enclosure, they do have to have them, whether interstate or intrastate.

Now, we are getting into this subject that you have mentioned, Judge.

"Few subjects of state regulation are so peculiarly of local concern as it the use of state highways. There are few, local regulation of which is so inseparate from a substantial affect on interstate commerce. Unlike the railroads, local highways are built, owned and maintained by the state or its municipal subdivisions. The state has a primary and immediate concern in their safe and eco-
[fol. 421] nomical administration. The present regulations, or any others of like purpose, if they are to accomplish their end, must be applied alike to interstate and intrastate traffic both moving in large volume over the highways. The fact that they affect alike shippers in interstate and intrastate commerce in large number within as well as without the state is a safeguard against their abuse."

There is your question of discrimination. If it operates against both of them, there is what appears to be a presumption that there is no discrimination, and not within the rule that the commerce clause itself affords protection.

"From the beginning, it has been recognized that a state can, if it sees fit, build and maintain its own highways, canals and railroads and that in the absence of congressional action their regulation is peculiarly within its competence, even though interstate commerce is materially affected."

And there they cite the Minnesota Rate cases. And incidentally, that citation is a hundred pages from the beginning of the opinion, quite a lengthy opinion that I wouldn't bring before this Court.

[fol. 422] "With respect to the extent and nature of the local interests to be protected and the unavoidable effect

upon interstate and intrastate commerce alike, regulations of the use of the highways are akin to local regulation of rivers, harbors, piers and docks, quarantine regulations, and game laws, which, Congress not acting, have been sustained even though they materially interfere with interstate commerce."

"In the absence of national legislation especially covering the subject of interstate commerce, the state may rightly prescribe uniform regulations adopted to promote safety upon its highways and the conservation of their use, applicable alike to vehicles moving in interstate commerce and those of its own citizens," citing Morris vs. Duby, 274 US 135.

"This formulation has been repeatedly affirmed," in a series of citations here, "and never disapproved."

"Never disapproved." I submit to this Court that it never has since then. This Court handed down this decision in 1937.

"This Court has often sustained the exercise of that power although it has burdened or impeded interstate commerce."

[fol. 423] So long as the state action does not discriminate, the burden is one which the Constitution permits because it is an inseparable incident of the exercise of legislature (sic) authority which, under the constitution, has been left to the states.

And here, we are getting into the very heart of our case.

"Congress, in the exercise of its plenary power to regulate interstate commerce, may determine whether the burdens imposed on it by state regulation, otherwise permissible, are too great, and may, by legislation designed to secure uniformity or in other respects to protect the national interest in the commerce, curtail to some extent the state's regulatory power. But that is a legislative, not a judicial function, to be performed in the light of the congressional judgment of what is appropriate regulation of interstate commerce, and the extent to which, in that field, state power and local interests should be required to yield to the national authority and interest.

"In the absence of such legislation the judicial function, under the commerce clause as well as the Fourteenth

[fol. 424] Amendment, stops with the inquiry whether the state legislature in adopting regulations such as the present has acted within its province, and whether the means of regulation chosen are reasonably adapted to the end sought."

That is the test, "whether the means of regulation chosen are reasonably adapted to the end sought."

That is the sole function of this Court, I submit, whether or not this contour splash guard is reasonably adapted to the end sought, and the end sought, of course, is the minimizing of water and mud splash on the highway.

Here is a little bit different way of saying the same thing, reading from 191:

"Since the adoption of one weight or width regulation, rather than another, is a legislative not a judicial choice, its constitutionality is not to be determined by weighing in the judicial scales the merits of the legislative choice and rejecting it if the weight of evidence presented in Court appears to favor a different standard."

Now, I know I have burdened this Court from the outset by pointing out that the old style mudflaps are not in controversy. This is a legislative not a judicial choice, and its constitutionality is not to be determined by weigh-
[fol. 425] ing in the judicial scales the merits of the legislative choice and rejecting it if the weight of evidence presented in Court appears to favor a different standard.

Now, I am not conceding that the weight of evidence here warrants a different standard from that prescribed by the legislature, I am only saying that this Court cannot even consider that. That is why I have said repeatedly that the old law or the old conventional mudflap provided by the old law is not in issue here. Their efficiency, their adequacy have no bearing because this Court cannot weigh in its judicial scales the merits of one against the other.

All that this Court can do is to determine whether or not the one that is prescribed by law bears a reasonable relation to the end sought. If it does, I think this Court is bound under the law to uphold it. If it doesn't, I think the Court is equally bound to enjoin its enforcement.

Judge Mercer: In other words, according to your contentions, we are not going to pass upon the question as to whether or not this does create a burden and obstruction in interstate commerce, if we find that the legislation is reasonable under the police power of the State of Illinois? [fol. 426] Mr. Husted: If it's a reasonable exercise of the police power, Your Honor, and if it's reasonably adapted to the end sought, it must be sustained, I submit, even though it materially affects interstate commerce, materially affects it.

In this case, the commerce was absolutely stopped, no truckers are going to get out and weld or torch off a half foot, six inches off the side of his truck, and the Supreme Court of the United States reversed that Court that issued that injunction in that case, in this Barnwell case.

A much more extreme situation than this Court has before it now. They couldn't enter; they couldn't. It wasn't a question of putting on a different type guard. They couldn't do that.

The Supreme Court of the United States said you cannot weigh in the judicial scales whether the 90 inch wide or the 96 inch wide is the right one.

Judge Mercer: Do you know whether that case was cited in the Arizona case, 325, was that case cited?

Mr. Husted: Yes, it was. This case is cited more, it wasn't brought out to attention of the Court, but this case is cited more in the subsequent reports of the Supreme Court of the United States than any other case involving use of the highway. It's in all of them. It's in this case; it's in the [fol. 427] Maurer vs. Hamilton case; it's in all of them after that, popularly known as the Barnwell case.

Judge Major: Do you dispute but what this law does place a burden upon commerce?

Mr. Husted: No, no.

Judge Major: It will place a burden on commerce?

Mr. Husted: It will place a burden on commerce.

Judge Major: I have been waiting for somebody to say. I don't know whether it's material or not. I thought somebody would ask the question of some of these witnesses, "What are these trucks going to do to get into these states? What do they have to do to get in?"

Mr. Husted: All they have to do is put on a contour splash guard.

Judge Major: At the state line?

Mr. Husted: No, no. There's been a classic example of making a mountain out of a mole hill insofar as these other state statutes are concerned. I have appended to our answer a list of all the state statutes, which I shall briefly go through. There is not a single statute in the United States concerning mud or rear splash equipment that this will not comply with, with the possible exception of this Arkansas administrative ruling, and there is a question but what they would comply with that. And even [fol. 428] if they can't, even if they can't comply with that, Mr. Stephenson has repeatedly asked "How can my trucks comply?"

Well, that isn't a proper question to a witness, but one of his own expert witnesses, Mr. Dolan, provided him with an excellent answer. He says that the flaps should be back here at the end of the truck. Well, we are concerned with the Illinois Statutes. We are not concerned with the Arkansas administrative ruling. But, he says that in any event it should be 12 inches behind the wheel. Well, this is a good 12 inches, it looks to me like, and if he wants to hang another flap on back there, and if the Arkansas regulation requires it, that is a problem down in Arkansas. That is not a problem of the Illinois Legislature.

Judge Major: You mean both of them?

Mr. Husted: Hang them both, yes. This flap isn't lawful in Illinois; it isn't lawful in Idaho or Oregon.

Judge Major: If Illinois has the right to do what you say they have, do what it has done, every other state has the same right.

Mr. Husted: That is right.

Judge Major: Suppose they all have different regulations that require a different kind of truck guards?

Mr. Husted: Where no one kind would fit all of them? [fol. 429] Judge Major: Yes.

Mr. Husted: Then, if Your Honors please, the Congress, which is in session every year, in the interest of uniformity, just as both these cases say, would go in and establish a uniform rule. They have reserved that to the state, to the

various states. They haven't covered it. They haven't preempted the field, notwithstanding the broad scope and effect of the Motor Carrier of Property Act of 1935.

But, just because they have up to the present time reserved it to the states does not mean that they will always have to do so. If it becomes a question of conflicting interest and conflicting specifications, in the interest of uniformity Congress can come in and establish a uniform standard.

But, they haven't been forced to do that, and whether they ever will or not is a matter of conjecture. I don't think they ever will.

Judge Briggle: Is it your position that the fact that Congress has not acted upon the question of mudflaps, as applied to interstate commerce, and the fact that the Interstate Commerce Commission has not acted upon it, precludes this Court from going into that question?

Mr. Husted: No, no; no. I think this Court will have to [fol. 430] find in accordance with the Barnwell case that the restriction imposed is reasonably adapted to the end sought.

Judge Briggle: And does not unnecessarily burden interstate commerce?

Mr. Husted: No. I don't think that is correct. It can materially, as this case holds, interfere with interstate commerce. It can materially do so so long as it's reasonably adapted to the end sought.

Judge Briggle: But you do recognize that the question of interference with interstate commerce is involved?

Mr. Husted: Oh, of course, of course. But I can't conceive of a more stringent regulation than one than a width and weight regulation that they absolutely can't comply with, that is, with the same trucks. Now, they can build them narrower, but there is no way that a trucker can slice six inches off the side of his truck the entire length.

Judge Briggle: Is that the Barnwell case?

Mr. Husted: That is the Barnwell case.

Judge Mercer: Is the question of burden and obstruction of interstate commerce directly raised in this case?

Mr. Husted: Yes.

Judge Mercer: The additional question over and above [fol. 431] the question of discrimination?

Mr. Husted: Yes, absolutely.

Judge Briggle: He means in the Barnwell case.

Mr. Husted: I mean the Barnwell case, too. The Barnwell case wasn't a case of discrimination. It operated alike to everybody. It was a South Carolina Statute. The South Carolina truckers had to comply if they used it on highways, so did the out of state. This case is directly in point. The only difference is that it affects a different portion of the truck, and it's a much more serious, insurmountable problem than these contour splash guards. It's one that they absolutely couldn't comply with, and the case came up the other way. The Three Judge Court had held the Statute bad as violating the commerce clause, being an undue interference with commerce on that very finding that it stopped commerce. It didn't slow it down, it stopped it.

The Supreme Court of the United States said that is a matter of state regulation. It's not discriminatory, and it strongly suggests this; even though in the judicial scale a different standard might seem advisable, they don't weigh one against the other; if it's reasonably adapted to the end sought, it's within the power of the state to do it.

Now, there hasn't been a single witness here that would [fol. 432] testify under oath, on either side, that this splash guard bore no reasonable relation whatsoever to the minimizing of side throw and splash. There was a wealth of testimony to the effect that in their opinion the old style were better and were preferable and were cheaper and were longer lived, but nobody said that it bore no relation, no reasonable relation to the end sought.

Their expert witness Mr. Dolan stated just before noon today that he couldn't say that this contour splash guard bore no reasonable relation to the minimizing of side throw and splash, and he further added, volunteered the statement, even a piece of paper hung behind there would help some, even a piece of paper hung behind there would help some.

I shall not go into the conflicting testimony. There was evidence to show that on our part these contour splash guards do arrest the side throw and splash, deflect it downward.

We had a film, the foreportion of which was not viewed by the Court, which showed very materially many of shortcomings of this type of guard, which we did not show for the reason that we thought it would be contrary to our theory of the case.

Simply because we haven't gone into these old style flaps [fol. 433] which we claim are not in issue, doesn't mean that we swallow everything that the Plaintiffs say about those.

Now, it has been contended, and this is a strong argument, that these Illinois prescribed guards are not acceptable, or do not meet the requirements of other Statutes, and that therefore the commerce will be impeded, or that they will have to stop at the state line and replace their conventional guards with Illinois guards.

I have appended to the answer the splash guard laws of all of the states of the United States which I have been able to find.

The Plaintiffs in their complaint stated there were 25. I couldn't find the Georgia Statute, and I haven't been able to find it yet, but with that exception, I have pleaded all of the other statutes, and I'd like to just briefly go through those to show what they provide.

In the main, they fall into three classes. They either provide for a contour guard as Illinois does—there are two states that very definitely do provide that, although the particular word "contour" is not expressly used in the Act, but the provisions definitely contemplate a contour guard. Those three are Idaho, Illinois and Oregon.

In the second class are those that are optional, that pro- [fol. 434] vide for a fender or suitable means of enclosure, or language to that effect.

The third type is just a vague reference to some kind of protector, that doesn't really specify any particular type, and we submit that under any one of the three, and Illinois splash guard would be in compliance with those various laws.

Judge Briggle: Let me ask you, before you start, are there any of those splash guards provided for in the states that you refer to, are they acceptable in Illinois? Do they comply with the Illinois Statute?

Mr. Husted: No, they wouldn't.

Judge Briggle: In other words, the Illinois Act is for 48 states, there is no other state that would be acceptable in Illinois?

Mr. Husted: No.

Judge Briggle: You say Illinois would be acceptable in those states?

Mr. Husted: Yes.

Judge Briggle: But no one of those is acceptable in Illinois, therefore, Illinois' act must be complied with by 48 states?

Mr. Husted: That is true.

Judge Briggle: Isn't that about the effect of it?

Mr. Husted: Illinois, Oregon and Idaho. They all have [fol. 435] this specification.

Judge Briggle: Well, then, would Oregon and Idaho be acceptable in Illinois?

Mr. Husted: Yes, I think so.

Judge Briggle: You would accept those two?

Mr. Husted: In fact, they are a little more stringent than Illinois. They require the fender not to come to the top of the wheel, but to come beyond the forward-most portion of the fender.

Here in Illinois it must come to the top line of the wheel. Idaho says beyond, and of course that "beyond" might only be a fraction of an inch insofar as the manner of appliance.

Judge Briggle: Go ahead with your line of argument.

Mr. Husted: The California Statute provides "shall operate on any highway any motor vehicle, trailer, or semi trailer unless equipped with fenders, covers, or devices, including flaps or splash aprons." We submit that Illinois would comply with that. It's a fender. That is exactly what it is; it's a cover. "Or devices, including flaps or splash aprons." They contemplate a splash apron on the bottom of them.

In Connecticut, I shall omit the portion that "can't use the highways," and I shall quote the part "unless the same is equipped with suitable metal protectors or substantial [fol. 436] flexible flaps behind the rearmost wheels, and, in case the rear wheels are not covered at the top and rear by fender, body or other parts of the vehicle, the rear wheels shall be covered at the top and rear by protective

means of such standard type or design and so installed as to reduce as far as practicable, such wheels from throwing dirt, water or other materials on the windshield of following vehicles." Well, now, clearly, an Illinois splash guard would be acceptable there.

Now, we come to Idaho, and this is one of the states that, notwithstanding Plaintiffs, I say has a contour splash guard provision: "On the rear wheels of every motor truck equipped with a body, motor bus, bus trailer, semi trailer or trailer such fenders or covers shall extend in full width from a point above and forward of the center of the tire or tires over and to the rear of the wheel or wheels to a point that is not more than ten inches above the surface of such highway when such vehicle is empty."

"From a point above and forward," so, it must be up here over into the rear of the wheel.

Now, it's true that it doesn't say "contouring" the wheel or spaced six inches from the wheel, or something like that, but how in the world could you have it come over and downward without contouring an object is beyond me. [fol. 437] The next Statute is that of Massachusetts: "Equipped with suitable guards which will effectively reduce the spray." Suitable guards. Well, certainly, an Illinois guard would be a suitable guard. It gives no specifications.

Michigan: "Shall be so constructed or equipped, or so operated, as to bar water or other road surface substances thrown from the rear wheels of such vehicle or combination at tangents exceeding 22½ degrees measured from the road surface. If flap type device is used, it shall not have attached any type of lamp," and so forth. "If the flap type is used," indicating other types. The only specification is that it reduce the throw to a tangent of 22½ degrees. Well, of course, the bottom of these can be raised and lowered the same as the flap. No provision in Illinois that it be a certain distance above the ground.

There is a provision that it be within ten inches of the ground, but it can go right to the ground if the operator so desires and be in compliance.

Minnesota: "With wheel flaps or other suitable protection above and behind the rearmost wheels of the vehicle or combination of vehicles to prevent, as far as practicable,

such wheels from throwing dirt, water, or other materials [fol. 438] on the windshields of vehicles which follow. Such flaps or protectors shall have a ground clearance," and so forth.

In many of these the ground clearance is based upon some formula based on the diameter of the wheel or the distance from the axle to the ground, and something like that. It usually works out about the same space as the Illinois Statute.

This Statute further provides: "If the rear wheels are not covered at the top by fenders, body or other parts of the vehicle, the flap or other protective means shall be extended at least to a point directly above the center of the rearmost axle."

So that apparently contemplates either a fender or a loose apron type flap.

Mississippi: "Unless such motor vehicle is equipped with suitable metal protectors or substantial flexible flaps on the rear-most wheels of such vehicle or combination of vehicles, so as to prevent as far as possible such wheels from throwing dirt, water and other materials . . . "

It doesn't say anything about the specifications or whether they are contoured or not; "suitable metal protectors."

And "provided, further, that if the said rear-most wheels [fol. 439] are not adequately covered at the top by fenders, body or other parts of the vehicle, the said protectors or flaps shall be extended to a point directly above the rear-most axle."

So, there, if they don't have a floor of the truck above it, it has to go up to a point directly above the rear-most axle.

Nebraska: "Shall be equipped with fenders, covers, or devices, including flaps or splash aprons."

New Hampshire: "Suitable flaps or guards."

New York. Now, there was testimony before this Court that New York had no splash statute. I think Section 15 of the vehicle and Traffic Law of the State of New York of 1956 states that: "After January 1st, 1957, it shall be unlawful to operate on any public highway," and so forth unless the same is constructed or equipped so as to reasonably

bar water or other road surface substances from being thrown by the rear-most wheels beyond the extreme rear of the vehicle or combination of vehicles.

Judge Briggle: That is New York?

Mr. Husted: That is New York, yes, sir.

Ohio: "Unless such vehicle is equipped with suitable metal protectors or substantial flexible flaps on the rear-most wheels of such vehicle or combination of vehicles to prevent as far as practicable such wheels from throwing [fol. 440] dirt, water or other materials on the windshields of following vehicles." It shall have a ground clearance of not more than one-fifth of the distance from the center of the rear-most axle to the center of the flaps. That is the ground clearance provision.

Oklahoma: "All trucks, trailers, and other vehicles, operating on the highways, except animal drawn vehicles, not equipped with fenders over the rear-most wheels shall have attached thereto a rubber or fabric apron directly in rear of the rear-most wheels." In other words, if they don't have a fender, that is all this splash guard is, is a quarter fender with a flap attached to the bottom of it, hanging directly downward. Then, we come to the Oregon Statute, and here again is one that I submit is one that contemplates a contour designed guard.

Oregon: "On the rear wheels of every motor truck equipped with a body, motor bus, bus trailer, semi trailer or trailer, such fenders or covers shall extend in full width from a point above and forward of the center of the tires over and to the rear of the wheels to a point that is not more than ten inches above the surface of the highway when the vehicle is empty."

That is very similar language to the Illinois Statute, and identical to the Idaho Statute.

[fol. 441] Pennsylvania: "Shall be so constructed or equipped as to bar water or other road surface substance thrown from the rear wheels of such vehicle or combination at tangents exceeding 22½ degrees, measured from the road surface."

Now, all of these tangent provisions are, can be complied with by this flap here just as well as if it were hung straight downward, and that flap can come down just as low as it

need be to comply with the tangent or the angle provided by the Statute, clear down even to zero, if necessary. I presume no state would ever do that, but if they did, an Illinois guard would comply.

Tennessee: "Equipped with rear fenders, mudflaps or mud guards which shall be of such size as will substantially prevent the projection of rocks, dirt, water or other substances to the rear."

Texas: "Safety guards or flaps of a type of material and construction prescribed by the Department, located and suspended behind the rear wheels of such vehicle to within six inches of the surface of the highway so as to prevent mud and road slush from the tires of such vehicle being transmitted to the windshield." And it is surprising that Texas would have a splash guard law.

Utah: "Equipped with suitable metal protectors or sub-
[fol. 442] stantial flexible flaps behind the rear-most wheels to prevent," and so forth. Either one would be acceptable in Utah.

Wisconsin: "Unless the same is equipped with rear fenders capable of restricting to a minimum the splashing of water, mud and other matter upon the windshields of following vehicles or, in lieu of such fenders, with mud guards constructed and placed to serve the same purpose."

Virginia: "Equipped with rear fenders, flaps or guards which shall be of such size as will substantially prevent the projection of rocks, dirt, water or other substance to the rear."

Washington: This is their entire act: "Every vehicle shall be equipped with a device adequate to effectively reduce the wheel spray or splash of water from the roadway to the rear thereof."

There is their only specification.

Now, with the exception of the Georgia Statute, which I have never been able to find, there is not a single one of those that the Illinois Act would not satisfy. That is a matter for this Court to determine. That wasn't a matter for any witness to decide. This Court will go through that.

I submit that there isn't a single one that this kind of
[fol. 443] a guard will not comply with.

Now, the act of Ohio was challenged here some two or three years ago.

Judge Major: What you have been reading for us is all set forth in your answer?

Mr. Husted: Yes, it is, every bit of it. When I went through, I just read excerpts from it, but the entire Statute is there in each instance.

Judge Briggle: Do you have extra copies of your answer, Mr. Husted?

Mr. Husted: Yes, I have some.

Judge Briggle: I wish you'd furnish a copy to Judge Major and Judge Mercer.

Mr. Husted: Do you want that right now?

Judge Major: No, not right now, but I'd like to have a copy of that.

Mr. Husted: Now, the Ohio Statute excerpt of which I have already read was challenged in the Tom's Express case, that is, Tom's Express versus the Division of State Highway Patrol, in the U. S. District Court for the Southern District of Ohio in the Eastern Division. It's reported in the 105 Federal Supplement at page 916.

Judge Briggle: A three-Judge case, was it?

Mr. Husted: Yes, three Judges.

Judge Major: They held the Statute good?

[fol. 444] Mr. Husted: Yes.

Judge Mercer: No appeal?

Mr. Husted: Yes, there was an appeal to the Supreme Court of the United States, and the Supreme Court of the United States wouldn't take it. No federal issue. Can't take the question of state regulation.

Judge Briggle: Challenged under the State Constitution of Ohio?

Mr. Husted: Challenged under the commerce clause of the United States Constitution.

This was an action by Plaintiffs against state officials of Ohio for the adjudication that the Ohio Statute requiring freight trailers weighing three tons or more be equipped with metal protectors or flexible flaps on rear wheels for violating the commerce clause, and its enforcement was enjoined.

Now, I would request the Court—. Do all the Judges here have copies of the Illinois Statute? I suppose you have them.

Judge Major: At home in our office?

Mr. Husted: No, Your Honor, before you here now.

Judge Major: I don't see any Illinois Statute around here.

Judge Briggle: Oh, this is your copy of the Act in question here.

[fol. 445] Mr. Husted: The act in question here.

Judge Mercer: We have it in the complaint.

Mr. Husted: In this Tom's case, the Statute read, and I would like to read the Statute and have the Court glance through the Illinois Statute as I read the Ohio one.

Judge Mercer: Are you going to read all that?

Mr. Husted: This Ohio Statute. Perhaps I could just call it to the attention of the Court that apparently the Ohio Statute would permit a flexible type. It speaks of suitable metal protectors or substantial flexible flaps on the rear-most wheels of such vehicle or combination of such vehicles to prevent as far as practicable such wheels from throwing dirt, water or other materials on the windshield of following vehicles. Shall have a ground clearance, and so forth. It has the same exclusions as the Illinois Statute with the exception of the agricultural exemptions.

Judge Major: Any kind of a flap would comply with that, wouldn't it?

Mr. Husted: Any kind would.

Judge Major: The conventional would?

Mr. Husted: Yes, even the conventional flap.

Judge Major: What question did they raise about it?

Mr. Husted: They claimed that it was a burden on inter-

[fol. 446] state commerce.

The District Court of Ohio held that the Ohio splash guard is a valid exercise of the police power of the State of Ohio; that the Act does not conflict with or overlap any act of the Congress of the United States or any regulation of the Interstate Commerce Commission; and that the federal government has not preempted the field of motor carrier regulations in connection with mud guards.

The Supreme Court wasn't going to weigh, as they already stated in the Barnwell case, they weren't going to weight the merits of one type of splash guard as against the other. It's a matter of state regulation appealed to the Supreme Court of the United States, and they wouldn't take it.

Judge Major: What did they do, dismiss the appeal?

Mr. Husted: Certiorari denied. They didn't have a certiorari in that kind of a case.

Mr. Axelrod: It was affirmed per curiam.

Judge Major: Decree affirmed per curiam. Do you have that citation?

Mr. Husted: Yes, I do. Let me furnish that to you in a few minutes. I was thinking it was certiorari denied, but the Supreme Court didn't take it on the ground that there was no federal question involved.

[fol. 447] Judge Major: Well, did they say that?

Mr. Husted: Yes, no federal question involved.

Judge Mercer: Did they write an opinion?

Mr. Husted: No, they published the usual abstract opinion.

Judge Mercer: And that was it?

Mr. Husted: That was it. I have that here. Appeal to the Supreme Court of the United States, and appeal dismissed, 343 US 944, no federal issue presented. A question of state regulation. Even if commerce is materially affected.

Judge Mercer: You are claiming that case is on all fours with this one?

Mr. Husted: Yes, it's on all fours.

Judge Major: Well, from what you said about that case, I don't see how, if they did claim, how could they claim any obstruction to commerce in that case, if they were permitted to use the conventional mud guard.

Mr. Husted: There is no difference in the law, Your Honor, whether the Statute provides a conventional mud guard or a contour mud guard. Up to that time, Ohio hadn't any.

Judge Briggle: They claimed they were interfering with free commerce because they were required to have a splash guard?

Mr. Husted: A splash guard; that is the same issue [fol. 448] we have here.

Judge Briggle: Well, not entirely. Not that simple.

Mr. Husted: Well, let me put it this way: This splash guard is the only one that the Legislature has now prescribed, and the issue is whether or not it, and not some other, is a reasonable exercise of police power of the state. That precise issue was before the District Court in Ohio.

As the Supreme Court said in the Barnwell case, we will not weigh the merits of one type as against the merits of the other, even though we may think a different standard should be the answer.

This '55 Act, if Your Honors please, was before the Supreme Court of Illinois. The '55 amendment is slightly different from the present act in that the side splash or the lip specifications are a little different. They had a specification there that the side splash must be kept within a tangent of 15 degrees from the top of the wheel, so that if you take a parallel line out from the wheel that splash couldn't exceed, couldn't come upward more than 15 degrees from this base line.

Well, the language was tricky, and that was taken out, and some agricultural exemptions added in the '57 amendment which is now before this Court.

[fol. 449] Judge Major: Well, what did the Illinois Supreme Court do with the old act?

Mr. Husted: It upheld it, upheld its constitutional validity.

Judge Major: That is a 1951 Act?

Mr. Husted: That is a 1955 Act. The '51 act, as far as I know, was never before the Court.

Judge Major: The Supreme Court upheld the 1955 Act. What was the reason for this recent act?

Mr. Husted: The act was amended by the Legislature somewhat.

Judge Major: They wanted to make it better?

Mr. Husted: Make it better, take some of the so-called bugs out of it. One of them was that tangent provision that gave all of us some trouble.

Now, here is what I think is the material portion of this case. Since this police regulation is fairly appropriate to

the expressed purpose of the Statute, it is immaterial so far as the Court is concerned whether it is the best possible means or in (sic) inferior to the 1951 enactment which it supplants.

So, the Supreme Court of Illinois, in accordance with the doctrine handed down in the Barnwell case, and in a long line of decisions, not only by the Supreme Court of the United States, but by many others, when it comes to [fol. 450] police power regulations, whether challenged under the Fourteenth Amendment or the commerce clause, if it's a reasonable exercise of the police powers, if it is reasonably adapted to the end sought, if, as Justice Bristow says is fairly appropriate to the express purpose of the Statute, it is immaterial so far as the Court is concerned whether it is the best possible means or is inferior to the 1951 enactment which it supplants.

Now, the Interstate Commerce question was not in the Warren case, of course, but the test of reasonableness and fairly appropriate to the expressed purpose of the Act, or as in the Barnwell case reasonably adapted to the end or result desired, it's all the same test, and the holding of the Court in accordance with that test, I submit, would have been the same had the commerce clause question actually been in it.

Judge Briggle: Mr. Husted, you were in the case that was before the Supreme Court of Illinois, weren't you?

Mr. Husted: I tried that case, yes, Your Honor. There wasn't any lower Court trial.

Judge Briggle: It was an appeal from some Justice of the Peace, some Justice of the Peace had fined somebody for a violation, is that the way of it?

Mr. Husted: It was some Justice. It wasn't a Judge [fol. 451] of a Court of record.

Judge Briggle: It went to the County Court in such fashion, and then it was appealed from the County Court?

Mr. Husted: He pleaded guilty and moved in arrest of judgment.

Judge Briggle: And went on the theory that the law was invalid?

Mr. Husted: Challenged the constitutionality of the Act as being an unreasonable exercise of police power.

Judge Briggle: Was it argued before the Supreme Court?

Mr. Husted: Oral argument?

Judge Briggle: Yes.

Mr. Husted: No.

Judge Briggle: In fact, there really wasn't any appearance for the Defendants there at all, was there?

Mr. Husted: Oh, yes.

Judge Briggle: There is an appearance shown here.

Mr. Husted: Well, he filed a brief and argument, the usual brief and argument, and didn't request oral argument, and that is kind of our policy over there, if the Appellant doesn't, we don't.

Judge Briggle: It was kind of a test case, wasn't it, that was designed to have the Statute affirmed as valid?

[fol. 452] Mr. Husted: Well, no. I don't think it was any test case. There were two of them filed.

Judge Briggle: Well, this case came up from St. Clair County.

Mr. Husted: One in St. Clair County and one in Sangamon County. I don't know that either one of them, both of them challenged the constitutionality of that act, but I don't know that either one of them were test cases. Perhaps they both were. They weren't test cases as far as the Attorney General's office is concerned.

Judge Briggle: All right.

Mr. Husted: In fact, we didn't know about it until the manuscript came in.

Judge Briggle: Does that conclude what you have to say?

Mr. Husted: Thank you.

Judge Briggle: How are you getting along with your reciprocal arrangements?

Mr. Husted: The reciprocal arrangements are at an end. I think the State of Illinois completely backed up on their reciprocal agreements. They decided that that was better.

Judge Mercer: That isn't in this lawsuit, although it's in the pleadings, but that isn't any matter for consideration by this Court?

[fol. 453] Mr. Husted: I am sure it isn't, yes. I am sure Illinois has no reciprocal agreement at this date with anyone.

Judge Briggle: Do you wish to make any reply, gentlemen, for the Plaintiffs?

REPLY ARGUMENT OF MR. HUSTED

Mr. Axelrod: Just for a moment, for the purpose of indicating to Your Honors the case of Tom's Express, I submit, which didn't involve this question at all because there was no attack in the Tom's Express case directed on the ground of undue burden or undue obstruction.

Judge Briggle: Is that the Ohio case?

Mr. Axelrod: The Ohio case. There was no attack on undue burden or undue obstruction.

Judge Mercer: Is that 309?

Mr. Axelrod: Yes, Your Honor.

Judge Major: No.

Judge Briggle: 105 Federal Supplement, he said.

Mr. Axelrod: That was the 105 Federal Supplement, 916 which was affirmed per curiam by the United States Supreme Court.

We take the vigorous position, Your Honors, that the other states covered by the answer of the State and the contention that those Statutes of the other states are contour guard requirements or Statutes are not contour guards. We vigorously deny that any of those state re-
[fol. 454] quirements are of the contour guard requirement. We specifically had evidence indicating that in Idaho and Oregon one of the carriers, whose operations are through that state operate through them with the conventional straight mudflap, and we deny specifically. As a matter of fact, Mr. Husted says he doesn't see how anyone could read the Idaho Statute without thinking it was a contour mud guard statute, and here is the Idaho Statute, as a matter of fact. Here is the top of the trailer and here is a tire, and the Idaho Statute says that it shall be in full width from a point above and forward to the center of the tire or tires over and to the rear of the wheel.

Now, I submit that is the kind of a mudflap which would be lawful in Idaho, and that is not a contour mudflap. That meets all the requirements of the Idaho Statute. It meets the same requirements of the Oregon Statute, and neither of them are contour statutes.

But in any case, it's also interesting to note that in the various statutes cited by Mr. Husted of the other states, they all contain apparently alternatives; many of them are of the kind that say "suitable mudflap requirements."

Now, Mr. Husted did admit, and I think it's very specific, that the Illinois Contour guard would be good in the 48 states, but he doesn't want to concede that it would be [fol. 455] good in Arkansas, and we deny that it would be good in Arkansas. But he admits that the vehicles equipped with the mudflap requirements of other states would not be good in Illinois. I think that is most significant.

Judge Major: Well, do you admit that the Illinois mud guard would be good in all other states except Arkansas?

Mr. Axelrod: I don't know as to that. I don't know the answer to that.

Judge Major: Is that material in this case?

Mr. Axelrod: Well, I think the material question here is the conflict between Arkansas and Illinois. That highlights and points up the conflict question. It's the burden question right there. It's the striking example of what could take place in this proceeding.

Judge Major: I am just wondering whether we are going to be up against a proposition of studying all these Statutes and trying to figure out——

Mr. Axelrod: I don't think it's necessary. I think the facts are sufficient when they indicate that two states are in conflict today, and that in and of itself is sufficient to enable this Court to determine this question of undue obstruction and burden.

Judge Mercer: I presume that if there had been rather startling conflicts between Illinois and other states that [fol. 456] that matter would have been presented, wouldn't it, just as you have presented the matter of conflict between Illinois and Arkansas?

Mr. Axelrod: Yes, yes, Judge.

Judge Mercer: And are we led to believe that there are no other conflicts existing except the conflict that has been established in the evidence between Illinois and Arkansas?

Mr. Axelrod: Well, there is the conflict existing to this extent that as we see it, no vehicle equipped with a mudflap in accordance with the requirement of 47 states would

be lawful in Illinois; conversely, it may be, except only for Arkansas, at the moment, that an Illinois contour vehicle might be lawful in 46 states, but not Arkansas.

Judge Mercer: Well, that is what I wanted to know.

Judge Briggle: Well, I think Mr. Husted has conceded that the splash guards consistent with the Statutory provision of all of the states would, with the exception of Idaho and Oregon, conflict with the Illinois Statute.

Mr. Axelrod: Yes.

Judge Briggle: In other words, they would not satisfy the Illinois Statute?

Mr. Axelrod: That's correct.

Judge Briggle: In other words, to get harmony in interstate transportation between the various trucking com-
[fol. 457] panies of the country, they will have to use the Illinois splash guard law, is that correct?

Mr. Axelrod: That's correct, Your Honor.

Judge Major: Well, how would that burden interstate commerce if they could use all the highways of this country and in all the states by using the Illinois guard? How would that burden commerce?

Mr. Axelrod: Well, in the first instance, you'd have to save and except Arkansas because the California vehicle right in California, pardon me, the Illinois vehicle which might be right in California wouldn't be right in Arkansas under the state of this record. But, the effect of that would be to say to the nation, to the carriers serving this country, "You equip all of your vehicles with contour mudflaps because if any of those vehicles ever attempt to operate in Illinois, they cannot enter it unless they have the contour mudflap." And so it's an edict of the carriers to equip their fleets whether the carrier be in Florida, whether the carrier be in the State of Oregon, to equip with a contour mudflap.

The last point I would just like to mention is this: Reliance is also made by the state upon the Maurer, Hamilton and the Barnwell Carolina cases. By coincidence, those two cases, as well as the Arizona train length case, were written by Justice Stone. He wrote the opinion in all three cases,
[fol. 458] and in the Arizona Pacific case, toward the end, he discussed the Maurer vs. Hamilton and the Barnwell cases, to , having them both fully in mind.

The problems in Maurer vs. Hamilton were not unsurmountable as Mr. Husted suggested. The problems in Barnwell vs. South Carolina were not unsurmountable, because in Barnwell vs. South Carolina the requirement was for a 90 inch wide vehicle. That was because of the state, the road conditions in South Carolina.

But, under Barnwell vs. South Carolina, interstate commerce was not impeded because of a vehicle 90 inches in width could travel from California through South Carolina into New York, and no other state would stop that vehicle, so that the free flow of interstate commerce was not involved or unduly burdened in that instance.

In other words, one could comply in that instance because that was the requirement that was maximum from the standpoint of restriction.

Now, the same is true with respect to Maurer vs. Hamilton. In that case, the Supreme Court held that you couldn't deck a car over the cab of a truck where the driver was in the cab. You couldn't deck the car over it because that was a hazard.

Now, that case didn't preclude the free flow of interstate commerce because the trucks would then either then have to [fol. 459] not carry that particular car, or would be so designed that they shouldn't carry it, and that same vehicle would be able to operate through the entire country under Maurer vs. Hamilton, under Barnwell vs. South Carolina.

So, by complying with the maximum standard without any other interference by other states it was possible for anyone to comply with Barnwell vs. South Carolina and Maurer vs. Hamilton. That is not the case here.

Judge Major: Well, this South Carolina case, they couldn't comply without changing the width of the trucks, could they?

Mr. Axelrod: Well, it wasn't the question of changing the width. You just didn't take the truck and slice part of the width off, slice off part of the truck, as Mr. Husted suggested. If you operate a vehicle on the South Carolina roads, because of our road conditions it can't be more than 90 inches wide, because our roads are narrow, that infers that anyone operating cross country could, using a vehicle 90 inches wide, operate from California through South

Carolina into New York, and that would not be restricting interstate commerce.

Judge Major: In other words, if they had a car of a width that South Carolina required, they could go through South Carolina and the whole country, and, in this case if [fol. 460] you have the guards that Illinois required, why, you can start out and operate there through all the country except Arkansas.

Judge Briggle: If you assume the other states will accept Illinois' contour guards.

Mr. Axelrod: But if you do that, then, what is to preclude California from saying "No" to Illinois contour guards? What is to preclude Illinois from saying "No"?

Mr. Husted: The Congress of the United States.

Mr. Axelrod: Then, if it's only the Congress of the United States, I revert to the statement in the Arizona case that for a hundred years, irrespective of whether or not Congress has acted, the Court, and not the State Legislature, is under the commerce clause the final arbiter of what is best for the competing demands of local or state versus national interests.

On that basis, I submit, that you don't need congressional legislation. This Court, under the law, has the right to judge.

Judge Major: One other question. The Attorney General seems to make quite a point of the fact that the Arizona case involved a railroad, while this involves trucks on the highways. Is there some great difference as to the effect it has to commerce?

Mr. Axelrod: I don't think, Your Honor, that the lan- [fol. 461] guage is intended to apply only to the railroads and not to the motor carriers.

I think the language is interstate commerce language. It's the kind of language that has developed around the interstate commerce clause, and the doctrine and the principle is the same because the language doesn't change any and doesn't have a different meaning interstate commerce-wise or burden-wise as applied to motor carriers versus railroads.

Judge Major: Were you going to furnish us with a copy of the answer?

Mr. Husted: Yes. I think I'll have to get those from the office, additional copies.

Judge Major: There aren't any other copies in the file, are there?

Judge Briggle: No.

Mr. Husted: I can give you one more copy, Judge.

Judge Major: Well, you have this marked appendix. Is that something that is attached to your answer?

Mr. Husted: Yes, Your Honor.

Judge Briggle: Court will be in a short recess.

(Whereupon, a short recess was had.)

Judge Briggle: I think you said something this morning, Mr. Axelrod, about furnishing a brief. Do you wish to furnish a brief?

[fol. 462] Mr. Axelrod: I don't, Your Honors.

Judge Briggle: How about you, Mr. Husted. Do you want to furnish us with a brief?

Mr. Husted: Not necessarily, Your Honor. If the Plaintiff files one, of course, we want to file a responding brief, but not otherwise.

Judge Briggle: I think it might be advisable, Mr. Axelrod, to have you furnish us with a short brief setting forth your views and accompany it with your proposed findings of fact and conclusions of law and a decree as you think the decree should be entered, and you do the same after he has furnished you a copy of his brief.

Mr. Husted: All right.

Judge Briggle: How soon can you furnish one?

Mr. Axelrod: We need the record, Your Honor. We need the record, and if we could have 10 to 15 days from receipt of the record, we would appreciate it.

(Whereupon, a short discussion was had as to preparation of the stenographic record, after which the following occurred:)

Judge Briggle: Well, you gentlemen do as you wish about ordering a record. But suppose you furnish us a brief. It need not be extensive, but we would like to have you submit the brief at the same time of the proposed [fol. 463] findings.

Mr. Axelrod: Yes, sir.

Judge Briggle: By the 30th of January. How much time do you want to reply?

Mr. Husted: Five days, your honor, five to ten days.

Judge Briggle: What?

Mr. Husted: Not more than ten days.

Judge Briggle: You indicated to me at the time of the first hearing that there should be an early adjudication of this controversy.

Mr. Husted: Very definitely.

Judge Briggle: Is there any pursuasive (sic) reason why there should be at this time?

Mr. Husted: None necessarily, Your Honor, except that the law has been in turmoil because of this particular action. I made that statement in reference to the fact that this law had been on the Statute, and Plaintiffs waited until it was almost time for the Act to become operative to even file their lawsuit, notwithstanding that the Legislature enacted this almost a year ago, and that there has been considerable litigation over this question for two or thece (sic) years. For that reason, I think we are at a stage now that we should have been at last summer or early this fall so, that the whole thing would be decided before the operational [fol. 464] date of the Statute, January 1, '58.

For that reason, we would urge the Court to be as expeditious as possible, and Mr. Axelrod, in getting his brief to us, and we would endeavor to get it answered in five days and not more than ten.

Judge Briggle: Mr. Axelrod would like to have January 30th. I try to follow your instructions by giving you what I considered an early setting in January.

Mr. Husted: You have done that, Judge.

Judge Briggle: The record today will show that the cause has been heard and concluded and taken under advisement.

Mr. Stephenson, are you going to file a separate brief, or are you going to join Mr. Axelrod, or what do you propose?

Mr. Stephenson: I haven't talked to Mr. Axelrod, Your Honor. I rather imagine that there will be just the one.

Judge Briggle: Leave to Plaintiff to file brief on or before January 30; leave to Defendants to file reply brief on or before February 10.

Do you want to file any reply?

Mr. Axelrod: We would like the privilege of doing so, five days.

Judge Briggle: Leave to Plaintiff to reply by February 15.

[fol. 465] We want each side to submit with their brief proposed findings of fact and conclusions of law and decree.

Judge Major: Do we have a copy of your intervening petition? You filed an intervening petition, didn't you?

Mr. Stephenson: Yes, sir.

Judge Major: Do you have a copy of that available for us?

Mr. Stephenson: It's been filed with the Court.

Judge Briggle: That is true, but there are three of us. Do you have separate copies for Judge Major and Judge Mercer?

Mr. Axelrod: I am ordering the record, and with counsel's permission, I would be very happy to supply the Court with a copy of the record, the transcript.

Judge Briggle: Very well.

Mr. Axelrod: If he will pardon me for doing so. I know the Court gets one record here, that is, the Clerk does.

Judge Briggle: Yes. There will be one copy furnished the Clerk's office, and if you care to furnish a copy to the other Judges, you may.

Mr. Axelrod: If it's all right with Mr. Husted.

Mr. Husted: It's all right with us.

Mr. Axelrod: I am ordering it.

[fol. 466] Judge Briggle: Now, gentlemen, in your brief, there will be a little additional burden on each of you in that connection in that there are three of us, and we'd each like to have a copy, and I suppose you better send Judge Major's to Hillsboro, Illinois, and you can send Judge Mercer's to Peoria.

We thank you, gentlemen, very much for your able presentation on both sides. Appreciate your helpfulness, and we don't appreciate the problem that has been dumped in our laps, but we will try to meet the situation as best we know how. Thank you all very much.

Mr. Axelrod: Thank you, Your Honor. We appreciate the opportunity of being here.

Mr. Husted: Thank you.

Judge Briggle: Court will stand adjourned.

(Whereupon, the hearing in the above-entitled cause was concluded, and the matter taken under advisement.)

[fol. 538]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

SOUTHERN DIVISION

Civil Action No. 2438

For Declaratory Judgment and Injunctive Relief

NAVAJO FREIGHT LINES, INC.,
a New Mexico corporation,

RINGSBY TRUCK LINES, INC.,
a Nebraska corporation,

PRUCKA TRANSPORTATION, INC.,
a Nebraska corporation,

DENVER CHICAGO TRUCKING CO., INC.,
a Nebraska corporation,

WATSON BROS. TRANSPORTATION CO., INC.,
a Nebraska corporation,

PACIFIC INTERMOUNTAIN EXPRESS CO.,
a Nevada corporation, Plaintiffs,

and

ARKANSAS-BEST FREIGHT SYSTEM, INC.,
an Arkansas corporation, Intervenor,

vs.

JOSEPH D. BIBB, Director of the Department of Public Safety of the State of Illinois,

and

WILLIAM H. MORRIS, Superintendent of the Division of State Highway Police, Department of Public Safety of the State of Illinois, Defendants.

OPINION—February 26, 1958

Before MAJOR, Circuit Judge, BRIGGLE and MERCER, District Judges.

MAJOR, Circuit Judge. Plaintiffs instituted this proceeding, praying for a declaratory judgment that Sec. 121.02 of the Uniform Act Regulating Traffic on Highways, being Sec. 218b of Chap. 95½, as amended (Ill. Rev. Stat.), effective July 8, 1957 (hereinafter referred to as the Act), be held unconstitutional and void, and that defendants be en- [fol. 539] joined from enforcing or instituting proceedings against plaintiffs under the Act. Arkansas-Best Freight System, Inc. was granted leave to intervene. The District Court issued a temporary restraining order.

On January 15, 1958, a three-Judge Court was convened in accordance with the requirements of Title 28 U.S.C.A. Sec. 2284. On January 15 and 16, 1958, the Court heard testimony offered by the respective parties, as well as argument of counsel, at the conclusion of which the matter was taken under advisement.

The Act under attack, entitled "Rear fender splash guards," provides:

> "It is unlawful for any person to operate any motor vehicle * * * upon the highways of this state * * * unless such vehicle is equipped with rear fender splash guards which shall comply with the specifications hereinafter provided in this section * * *."

The specifications require that the splash guards (1) contour the wheel; (2) cover the top 90° of the rear 180° (excepting vehicles of less than five inches clearance, and requiring that they contour within two inches of the body); (3) extend downward to within ten inches of the ground; (4) have a lip or flange of two inches upon the outside edge, and (5) retain its general parallel condition under all operating conditions when mounted as required by the statute not more than six inches from the tread when fully loaded.

Plaintiffs named in the caption are all corporations organized and existing under laws of states other than

Illinois. They are all engaged in the transportation of property by motor vehicle as a common carrier in interstate commerce generally over regular routes. They all operate pursuant to a certificate of public convenience and necessity issued by the Interstate Commerce Commission. None of plaintiffs other than Watson Bros. render any intrastate transportation in Illinois and hold no authority from the Illinois Commerce Commission to operate in such [fol. 540] commerce. Watson Bros. operates to a limited extent in intrastate commerce in Illinois, for which it holds authority from the Illinois Commerce Commission.

Joseph D. Bibb is Director of the Department of Public Safety of the State of Illinois, which department maintains the division known as the State Highway Police, of which defendant William H. Morris is Superintendent. These officials are charged with the duty and responsibility of enforcing the provisions of the Uniform Act Regulating Traffic on Highways, including the section involved in this proceeding.

Notwithstanding our findings of fact and conclusions of law entered concurrently with this opinion, we deem it advisable to elaborate on the factual as well as the legal situation. Navajo Freight Lines, Inc. (hereafter Navajo) is a New Mexico corporation with its principal office at Denver, Colorado. It operates between points in the states of Arizona, California, Colorado, Illinois, Indiana, Iowa, Kansas, Missouri, Nebraska, Nevada, New Mexico, Oklahoma and Texas. It operates approximately 32 million miles per year in interstate commerce, with 7% of its mileage over Illinois highways. Ringsby Truck Lines, Inc. (hereafter Ringsby) is a Nebraska corporation and operates between points in the states of California, Colorado, Illinois, Iowa, Kansas, Missouri, Nebraska, Nevada, Utah and Wyoming. It operates approximately 30 million miles per year in interstate commerce, of which 3% is over Illinois highways. Prucka Transportation, Inc. (hereafter Prucka) is a Nebraska corporation and operates between points in the states of Colorado, Illinois, Indiana, Iowa, Kansas, Missouri, Nebraska and Wyoming. It operates approximately 5 million miles per year in interstate commerce, of which 5% is over Illinois highways. Denver

Chicago Trucking Co., Inc. (hereafter Denver) is a [fol. 541] Nebraska corporation operating between points in the states of Arizona, California, Colorado, Connecticut, Idaho, Illinois, Indiana, Kansas, Massachusetts, Michigan, Missouri, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Utah, Washington and Wyoming. It operates approximately 57 million miles per year in interstate commerce, of which approximately 4% is over Illinois highways. Watson Bros. Transportation Co., Inc. (hereafter Watson) is a Nebraska corporation and operates between points in the states of Arizona, California, Colorado, Illinois, Iowa, Kansas, Minnesota, Missouri, Nebraska, New Mexico and Wyoming. It operates approximately 58 million miles per year in interstate commerce, of which 7% is over Illinois highways. Pacific Intermountain Express Co. (hereafter Pacific) is a Nevada corporation and operates between points in California, Colorado, Idaho, Illinois, Indiana, Kansas, Missouri, Montana, Nevada, Oregon, Utah, Washington and Wyoming. It operates approximately 90 million miles per year, of which 3% is over Illinois highways.

Each of the plaintiffs is at present operating its trailers with what is termed the conventional or straight mud or splash guard which is recognized as legal in all the forty-eight states other than Illinois. Each of the plaintiffs, in order to operate in Illinois, will be required to equip its trailers with the contour type splash guard required by the Illinois Act, the cost of which is $30 or more per vehicle. Navajo will be required to make such installation on approximately 733 trailers, at a cost of $21,990; Ringsby, on approximately 468 trailers, at a cost of $14,040; Prucka, on approximately 150 trailers, at a cost of $4,500; Denver, on approximately 750 trailers, at a cost of $22,500; Watson, on approximately 1528 trailers, at a cost of $45,840; Pacific, on approximately 1200 trailers, at a cost of $36,000. Moreover, from two to four hours [fol. 542] of labor are required to install or remove a contour splash guard. The expense incident to maintenance and replacement is heavy.

The service rendered by plaintiffs requires that they interchange trailers, and for many years this has been

the practice. For example, a carrier which serves between Portland, Oregon and Denver, Colorado, will handle and originate a trailer load of perishable commodities destined for Chicago. The original carrier will move the trailer from Portland to Denver and then deliver it, without transferring the load, for movement to destination via any one of the plaintiffs herein. This interchange service constitutes a substantial proportion of the transportation business of each of the plaintiffs, ranging from 30% to 65%. For example, in the year 1956, the revenue derived by Pacific from traffic which moved through its Chicago terminal amounted to approximately $3,182,000. The revenue derived by Watson for the month of May, 1957, moving through its Chicago terminal, amounted to approximately $1,000,000, of which more than one-third was on traffic moved into the Chicago terminal from points outside of the state of Illinois. It derived revenue in the same month from freight moving through its Peoria, Illinois, terminal of approximately $107,000, of which about one-third was from freight moving into Peoria from points outside of the state of Illinois. Other plaintiffs received comparable revenue from interchange traffic passing through Illinois.

This interchange of traffic is necessary and essential for the efficient and prompt service which plaintiffs are required to render. More than that, a considerable portion of the service required of plaintiffs could not otherwise be rendered. For instance, plaintiffs render transportation [fol. 543] service to the United States Government, including the transportation of explosives which are required to be handled in sealed trailers which cannot be opened until delivered. This service in the main could not be rendered absent the ability of the originating carrier to interchange with other carriers. Plaintiffs also carry substantial amounts of commodities which because of their nature, such as their size or weight, or because they are perishable, cannot be physically transferred from one trailer to another without damage and delay. Again, proper service can be rendered only because plaintiffs are able to interchange trailers, carrying such shipments, with other carriers which are authorized to complete the journey to the point of the shipment's destination. More

than that, many shippers and consignees specify in their bills of lading that the commodity which they ship must remain in the same trailer until it reaches its destination.

This statement, so far, is in the main a brief résumé of the factual allegations of the complaint either admitted or not disputed by defendants. It should also be noted, and this is without dispute, that each of the plaintiffs upon entering Illinois is required not only to equip a trailer owned by it so as to comply with the Illinois Act, but is also required to equip a trailer in use by it but owned by another carrier. This it has no right to do without the specific authority of the other carrier.

We were led to believe at the time of the hearing, and still believe, that all of the states, except Illinois and perhaps Oregon and Idaho, require nothing more than the conventional or straight mud flap, none of which would comply with the Illinois Act. During oral argument the following colloquy took place between Judge Briggle and Mr. Husted, counsel for defendants:

> [fol. 544] "Judge Briggle: In other words, the Illinois Act is for 48 states, there is no other state that would be acceptable in Illinois?
>
> Mr. Husted: No.
>
> Judge Briggle: You say Illinois would be acceptable in those states?
>
> Mr. Husted: Yes.
>
> Judge Briggle: But no one of those is acceptable in Illinois, therefore, Illinois' act must be complied with by 48 states?
>
> Mr. Husted: That is true."

Later, counsel modified his answers by stating that the splash guard provided by Oregon and Idaho would be acceptable in Illinois. In the written brief subsequently filed, counsel brands as untrue "plaintiffs' contention that 'splash guards which are permitted in all other states are illegal in Illinois' and that 'the Attorney General admits this as to 45 states.'" The argument proceeds:

> "As above explained, almost all of the states which have anti-splash statutes require a cover or fender and

certain ones permit the old style flap as an alternative or stop-gap measure. *The fenders required by these other states are legal in Illinois.* [Italics ours.]"

As we understand this statement, counsel for defendants now claim that splash guards or fenders required by other states would be recognized by Illinois. It is difficult to believe that such a concession was intended. If so, there is no reason for this law suit in which plaintiffs seek to invalidate the Illinois Act which prevents them from entering Illinois equipped with mud flaps in accordance with the laws of the states of their respective domiciles.

It was also conclusively shown that the contour mud flap possesses no advantages over the conventional or straight mud flap previously required in Illinois and presently required in most of the states. Counsel for defendants in oral argument substantially so conceded, as evidenced by the following statement, "There was a wealth of testimony to the effect that in their opinion the old style were better and were preferable and were cheaper and were longer [fol. 545] lived, but nobody said that it bore no relation, no reasonable relation to the end sought." In connection with this admission it should be noted that counsel consistently throughout the hearing took the position that such comparison was irrelevant, objected to the admission of such testimony and for the same reason, we assume, offered no testimony on this point in rebuttal.

The intervenor, Arkansas-Best Freight System, Inc., is an Arkansas corporation and is engaged in the transportation of property by motor vehicle as a common carrier in interstate commerce between points in the states of Arkansas, Kansas, Missouri, Illinois, Louisiana and Texas, pursuant to a certificate of public convenience and necessity. The greater part of its operations over Illinois highways involves the transportation of property moving in interstate commerce.

On December 13, 1957, the Arkansas Public Service Commission entered an order which requires that trailers operating on Arkansas highways be equipped with "a perpendicular, flexible type mud guard hanging at a right angle from the trailer." Since the Illinois Act requires that the splash guard contour the wheel, it is evident that a

single splash guard cannot satisfy the requirements of both states. It is, therefore, hardly open to doubt that use by intervenor of a splash guard which meets the requirements of the state of its domicile would be unlawful and not permitted in the state of Illinois. Conversely, a trailer equipped with a mud flap in accordance with the Illinois requirement would not be permitted in the state of Arkansas and its use in that state would be unlawful. In fact, a driver-employe of intervenor engaged in the operation of a trailer upon a public highway in Illinois was, on January 2, 1957, arrested and charged with a violation of the Illinois Act. A hearing on the charge was continued, pending the result of this litigation.

[fol. 546] Intervenor's Director of Labor and Safety testified as to the situation resulting from the conflict in the requirements imposed by the two states. In response to the suggestion that a trailer at the state line might be stopped and equipped to comply with the Illinois Act, the witness stated:

> "* * * that would entail quite a maintenance program and a terrific additional maintenance cost because we do all our maintenance work, all our major maintenance work at our Little Rock shop, and other points such as St. Louis and Fort Smith are merely emergency service points."

The witness also testified as to the problem presented in complying with the Illinois Act, with trailers received from other carriers in exchange and with trailers loaded with explosives:

> "* * * we haul explosives from the Red River Arsenal in Texarkana, and there is one specific carrier I can think of now, Red Ball Motor Freight, who operates primarily in Louisiana and Texas. They also haul a lot of explosives out of there, and when that arsenal calls our Texarkana terminal manager to come out and get 'x' number of loads, they do not take in regard whose trailer it is, but they merely load so many trailers going in our direction, and we go out there and pull those trailers. If they were to load those on a Red Ball trailer, and Red Ball, being a Texas domiciled carrier, we would be all right with his mud flap

until we got to the Illinois line. Then we would have to stop there and add the contour mudflap, operate it east of St. Louis, and when it returns to St. Louis, we would have to remove it and the contour mud flap, having to be welded, we would have quite a problem welding them on and several days later going in there and attempting to take them off.

"Further, under the interchange carrier agreement, we would have to contact Red Ball Motor Freight in Dallas, Texas, and receive their authority to add this contour mudflap to their pieces of equipment.

* * * * * * *

"Q. With a load of explosives, would you be in a position to weld the contour mudflap on the trailer?

A. Definitely not.

Q. Why?

A. Because of the danger of explosion, fire, and things of that nature."

[fol. 547] A witness for Watson described the problem presented by an attempt to comply with the Illinois Act, as follows:

"Any time you stop a trailer to do anything to it, it disrupts the service. Motor carriers exist on a fast, efficient transportation service and; if we were required to stop a trailer, assuming we had permission to install the mudflap on a foreign trailer, that is, a connecting line trailer, if we were required to stop that trailer at some state line or some garage to install a contour mudflap, there is bound to be delay which restricts the kind and type of motor carrier service we have been providing for years."

It would unduly prolong this opinion to quote further from the testimony. It is sufficient to state that the testimony of the witnesses just quoted finds abundant corroboration in the record. In fact, the seriousness of the problem to interstate motor carriers is not challenged by defendants. Rather, the state takes the position that it is not concerned with the problem or the difficulty with which such carriers are presented. It is significant that during the hearing, including the argument, no practical or reasonable suggestion was made as to how the Act could be complied with.

Congress has not seen fit to exercise its constitutional power to legislate relative to splash guards on trailers engaged in interstate commerce. The importance of uniformity would seem to suggest the desirability of such legislation. However, in its absence the question arises as to what protection, if any, is afforded by the commerce clause of the Constitution. Defendants do not and could not dispute but that enforcement of the Act would impose some burden upon interstate commerce. Their position, however, is, as we understand, that such burden is immaterial in view of the fact that the Act is non-discriminatory as between intra- and interstate commerce, and further, that the Act is a reasonable exercise by the legislature of its police power, inasmuch as its purpose is to provide for the safety of persons and motor vehicles using the high- [fol. 548] ways. Plaintiffs contend that the burden imposed upon commerce is of such magnitude as to entitle them to protection under the commerce clause, that it is greater than can be justified under the police power and without merit as a safety measure.

We gather from a study of the cases that the conflicting interest between the federal and state governments must be resolved in accordance with the facts of each case. It is our firm conviction, under the proof, that enforcement of the Act would impose not merely some but a tremendous burden upon interstate commerce. Particularly is this so as to commerce between the states of Illinois and Arkansas; in fact, commerce between those two states would be stymied to the extent that its future existence would be imperiled, if not obliterated. More than that, the same insurmountable burden would be imposed upon commerce between Illinois and any other state or states which might see fit to do as Arkansas has done, that is, exclude trailers equipped with the contour splash guard required by the Act. Furthermore, we are convinced that little, if anything, can be claimed for the Act as a safety measure. We have already noted the concession that the weight of the evidence is to the effect that the contour possesses no advantages over the straight or conventional mud flap. While there is some proof of advantages possessed by the contour flap, there is also proof of its disadvantages. In fact, there is rather convincing testimony that use of the con-

tour flap creates hazards previously unknown to those using the highways.

[fol. 549] Plaintiffs, in support of the contention that the Act should be held unconstitutional, rely upon Southern Pacific Co. v. Arizona, 325 U.S. 761, and Morgan v. Virginia, 328 U.S. 373. Defendants, in opposition thereto, rely upon South Carolina State Highway Department et al. v. Barnwell Brothers, Inc., et al., 303 U.S. 177, and Maurer et al. v. Hamilton, 309 U.S. 598.

In the Southern Pacific case, the Court held unconstitutional the Arizona Train Limit Law which made unlawful operation within the state of a passenger train of more than fourteen cars or a freight train of more than seventy cars. In doing so it reversed the Supreme Court of Arizona which had sustained the Act as a safety measure within the police power of the legislature to enact. It can hardly be doubted but that the reasoning of the Court in Southern Pacific, if applicable, strongly supports plaintiffs' contention in the instant case. Defendants, however, deny its applicability on the ground that the statute there under consideration related to transportation by railroad, while in the instant case it relates to transportation by motor carrier, relying upon the Barnwell and Hamilton cases.

In these cases the Supreme Court sustained the validity of state legislation regulating motor traffic within the state. In Barnwell, the legislation prohibited the use on the state highways of South Carolina of motor trucks whose width exceeded 90" and whose weight included a load in excess of 2000#. In Hamilton, the Court sustained the validity of a Pennsylvania statute which prohibited the operation on the highways of the state of any vehicle carrying any other vehicle "above the cab of the carrier vehicle or over the head of the operator of such carrier vehicle." Undoubtedly, Barnwell and Hamilton stand for the proposition that a state in the exercise of its police power has greater latitude [fol. 550] in the regulation of motor vehicles than it does of railroads. This is because the former generally is concerned with matters of local interest while the latter more often is concerned with the national interest.

In Barnwell, the Court stated (page 185):

"* * * it has been recognized that there are matters of local concern, the regulation of which unavoidably

involves some regulation of interstate commerce but which, because of their local character and their number and diversity, may never be fully dealt with by Congress. Notwithstanding the commerce clause, such regulation in the absence of Congressional action has for the most part been left to the states by the decisions of this Court, subject to the other applicable constitutional restraints."

Further, the Court stated (page 187):

"Few subjects of state regulation are so peculiarly of local concern as is the use of state highways. There are few, local regulation of which is so inseparable from a substantial effect on interstate commerce. Unlike the railroads, local highways are built, owned and maintained by the state or its municipal subdivisions. The state has a primary and immediate concern in their safe and economical administration. The present regulations, or any others of like purpose, if they are to accomplish their end, must be applied alike to interstate and intrastate traffic both moving in large volume over the highways. The fact that they affect alike shippers in interstate and intrastate commerce in large numbers within as well as without the state is a safeguard against their abuse."

Thus, the Court treated the weight and width requirements as of local concern even though they affected interstate commerce. It was on this premise that the Court held the Act constitutional and stated that the inquiry under the commerce clause was whether the state legislature in adopting the regulations under attack (page 190) "has acted within its province, and whether the means of regulation chosen are reasonably adapted to the end sought."

The Hamilton case also treated the statute under attack as relating to a matter of local concern. The Court pointed out (page 605):

"The width, grades, curves, weight-bearing capacity, surfacing and overhead obstructions of the highways differ widely in the forty-eight different states and in

[fol. 551] different sections of each state. There are like variations with respect to congestion of traffic. State regulation, developed over a period of years, has been directed to the safe and convenient use of the highways and their conservation with reference to varying local needs and conditions."

This appraisement of Barnwell and Hamilton appears to have been recognized by the Supreme Court in the later cases of Southern Pacific Co. and Morgan. For instance, in the Southern Pacific case (page 767) the Court stated:

"When the regulation of matters of local concern is local in character and effect, and its impact on the national commerce does not seriously interfere with its operation, and the consequent incentive to deal with them nationally is slight, such regulation has been generally held to be within state authority." [Citing the Barnwell and Hamilton cases.]

In contrast, the Court on the same page stated:

"But ever since Gibbons v. Ogden, 9 Wheat. 1, the states have not been deemed to have authority to impede substantially the free flow of commerce from state to state, or to regulate those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority."

The Court also stated (page 781):

"More recently in Kelly v. Washington, 302 U.S. 1, 15, we have pointed out that when a state goes beyond safety measures which are permissible because only local in their effect upon interstate commerce, and 'attempts to impose particular standards as to structure, design, equipment and operation [of vessels plying interstate] which in the judgment of its authorities may be desirable but pass beyond what is plainly essential to safety and seaworthiness, the State will encounter the principle that such requirements, if imposed at all, must be through the action of Congress which

can establish a uniform rule. Whether the State in a particular matter goes too far must be left to be determined when the precise question arises.'"

The Court further stated (page 779):

"The principle that, without controlling Congressional action, a state may not regulate interstate commerce so as substantially to affect its flow or deprive it of needed uniformity in its regulation is not to be avoided by 'simply invoking the convenient apologetics of the police power,' Kansas City Southern R. Co. v. Kaw Valley District, 233 U.S. 75, 79 * * *."

This distinction drawn between regulations concerned with local matters and those involving the national interest [fol. 552] is emphasized in the Morgan case, wherein the Court held unconstitutional an Act of Virginia which required passenger motor vehicle carriers, both interstate and intrastate, to separate without discrimination the white and colored passengers in their motor buses. First the Court discussed the test to be applied in determining whether a state statute is invalid as imposing an undue burden upon commerce. The Court stated (page 377):

"The precise degree of a permissible restriction on state power cannot be fixed generally or indeed not even for one kind of state legislation, such as taxation or health or safety. There is a recognized abstract principle, however, that may be taken as a postulate for testing whether particular state legislation in the absence of action by Congress is beyond state power. This is that the state legislation is invalid if it unduly burdens that commerce in matters where uniformity is necessary—necessary in the constitutional sense of useful in accomplishing a permitted purpose. Where uniformity is essential for the functioning of commerce, a state may not interpose its local regulation. Too true it is that the principle lacks in precision. Although the quality of such a principle is abstract, its application to the facts of a situation created by the attempted enforcement of a statute brings about a

specific determination as to whether or not the statute in question is a burden on commerce. Within the broad limits of the principle, the cases turn on their own facts."

The Court, commencing on page 378, cites many cases in support of three propositions:

(1) "In the field of transportation, there has been a series of decisions which hold that where Congress has not acted and although the state statute affects interstate commerce, a state may validly enact legislation which has predominantly only a local influence on the course of commerce. [Citing Barnwell and Hamilton.]"

(2) "It is equally well settled that, even where Congress has not acted, state legislation or a final court order is invalid which materially affects interstate commerce. [Citing Southern Pacific.]"

(3) "Because the Constitution puts the ultimate power to regulate commerce in Congress, rather than the states, the degree of state legislation's interference with that commerce may be weighed by federal courts to determine whether the burden makes the statute unconstitutional. [Again citing Southern Pacific.]"

In appraising the effect which the statute had on interstate commerce, the Court stated (page 381):

[fol. 553] "To appraise the weight of the burden of the Virginia statute on interstate commerce, related statutes of other states are important to show whether there are cumulative effects which may make local regulation impracticable."

In holding the Act unconstitutional, the Court further stated (page 386):

"As there is no federal act dealing with the separation of races in interstate transportation, we must decide the validity of this Virginia statute on the challenge that it interferes with commerce, as a matter of balance

between the exercise of the local police power and the need for national uniformity in the regulations for interstate travel."

Thus, the distinction between the two lines of cases does not arise, as defendants contend, from the fact that the Court, in Barnwell and Hamilton, was concerned with transportation by motor vehicle and in Southern Pacific with transportation by railroad. The distinction lies in the fact that in the two former cases the provisions under consideration related to matters of local concern while in the latter case the provision related to a matter of national concern. Defendants apparently recognize this distinction by arguing that the Act under attack is of local concern, on the basis that Illinois is a "wet-weather" state, having a large amount of wet, rainy and snowy weather, causing its roads to be wet and dirty for a substantial portion of each year. Defendants offered in evidence a report of the United States Weather Bureau showing the average annual precipitation at different points in the state. No similar proof, or proof of any kind, was offered as to the weather and highway conditions in other states. The mere fact that large amounts of rain and snow fall upon the highways of Illinois furnishes no support to the argument that the requirement as to splash guards is a matter of local concern in the absence of a showing that weather conditions affecting highways is different in other states, particularly those surrounding Illinois. We know, however, from ex- [fol. 554] perience common to all who travel the highways of this country that the situation under discussion is the same or similar in many states, and perhaps all. Particularly is that true in states surrounding Illinois and others of the midwest.

Defendants take no note of the burden which the Act places upon commerce, which perhaps is consistent with the theory that it relates to a matter of local concern and the burden, therefore, is immaterial. We reject the premise upon which this theory is predicated. The burden is material because enforcement directly relates to the national interest. That burden, in our judgment, will be tremendous. In fact, enforcement is likely to produce a demoraliz-

ing effect upon the operations conducted by plaintiffs, the intervenor and others similarly engaged. The certificate of public convenience and necessity issued to plaintiffs and other motor carriers by the Interstate Commerce Commission requires that they "shall render reasonably continuous and adequate service to the public in pursuance of the authority herein granted, and that failure to do so shall constitute sufficient grounds for suspension, change or revocation of this certificate." It is not discernible to us how plaintiffs can discharge their responsibilities under this certificate and at the same time comply with the requirements of the Illinois Act. It is hardly open to question but that compliance will result in intolerable delay in transportation and the expenditure of large sums of money for equipment and maintenance.

We are not impressed with defendants' argument that the Act should be sustained on the basis that the legislature acted within its police power and that the means of regulation chosen by it are reasonably adapted to the end sought. We assume that the contour splash guard will serve some beneficial purpose in eliminating splash. The [fol. 555] same could be said for a piece of cardboard or other object hung behind the rear wheels of a trailer. As already shown, the conventional or straight mud flap previously recognized in Illinois and presently recognized by most and perhaps all of the other states served the purpose of preventing splash as well as does the contour guard. The result of the requirements of the Act is to place a great burden upon commerce, without any compensating benefit to the state. Under the circumstances, it cannot be held that the requirements of the Act are reasonably adapted to the end sought. In any event, a challenge that the Act interferes with commerce requires this Court to decide its validity "as a matter of balance between the exercise of the local police power and the need for national uniformity in the regulations for interstate travel." Morgan v. Virginia, 328 U.S. 373, 386. In our judgment, the burden which the Act casts upon commerce far outweighs any benefit derived by the state.

It is, therefore, our view and we so hold that the Act is unconstitutional and void, as violative of Article I, Section

8, of the Constitution of the United States, and that plaintiffs are entitled to a decree permanently enjoining its enforcement.

[File endorsement omitted]

[fol. 556]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

SOUTHERN DIVISION

Civil Action No. 2438, In Chancery

NAVAJO FREIGHT LINES, INC.,
a New Mexico Corporation, et al.

vs.

JOSEPH D. BIBB, Director of the Department of Public Safety of the State of Illinois, et al.

Findings of Fact and Conclusions of Law— February 26, 1958

I. FINDINGS OF FACT

1. That each of the plaintiffs operates in interstate commerce pursuant to certificates of public convenience and necessity issued by the Interstate Commerce Commission.

2. That pursuant to said certificates, each of the plaintiffs operates into and through the State of Illinois.

3. That intervener Arkansas-Best Freight System, Inc. operates in interstate commerce pursuant to a certificate of public convenience and necessity issued by the Interstate Commerce Commission.

4. That pursuant to said authority, Arkansas-Best Freight System, Inc. operates between points in Arkansas and Illinois, as well as between Arkansas and other States through Illinois.

5. That intervener Arkansas-Best Freight System, Inc. also operates in intrastate commerce in the State of Arkansas, pursuant to authority granted by the Arkansas Public Service Commission, and is subject to the rules and regulations of said Commission.

6. That Section 121.02 of the Uniform Act Regulating Traffic on Highways, being Section 218b of Chapter 95½, Illinois Revised Statutes, as amended, by Act approved July 8, 1957, requires that trailers of plaintiffs and intervener be equipped with a contour spash (sic) guard meeting [fol. 557] certain described specifications and contouring the wheel within six (6) inches of the tire.

7. That compliance with said Act for vehicles used exclusively in interstate commerce by plaintiffs and intervener would cost each of them in excess of Three Thousand ($3,000.00) Dollars.

8. That on December 13, 1957 the Arkansas Public Service Commission issued an order requiring that all vehicles using Arkansas highways be equipped with the straight spash (sic) guard hanging perpendicular to the trailer and parallel to the rear axle.

9. That it is impossible for a splash guard to comply with the requirements of the Illinois Splash Guard Act and the order of the Arkansas Public Service Commission.

10. That a vehicle equipped with the splash guard required in Illinois cannot be operated legally in Arkansas, and a vehicle equipped with the splash guard required in Arkansas cannot be operated legally in Illinois.

11. That the splash guards permitted or required in 45 States are illegal in the State of Illinois by virtue of the Illinois Splash Guard Act.

12. That by virtue of the conflicting requirements of Illinois and Arkansas, the free flow of commerce by motor carriers is obstructed because equipment legal in one State is illegal in the other.

13. That each of the plaintiffs and intervener interchanges trailers with carriers throughout the United States

in accordance with common and accepted practice of motor carriers in interstate commerce in order to provide through trailer service from origin to destination in compliance with the certificate of public convenience and necessity issued to them by the Interstate Commerce Commission.

14. That the trailers of each of the plaintiffs may reasonably be expected to traverse each of the 48 States by virtue of the interlining practices of plaintiffs and intervener with other carriers.

[fol. 558] 15. That the trailers of each of the plaintiffs traverse upon highways of the State of Arkansas.

16. That because trailers equipped in accordance with Illinois splash guard requirements cannot be operated legally in Arkansas, and trailers equipped in accordance with Arkansas splash guard requirements cannot be operated legally in Illinois, the interlining operations of plaintiffs will be obstructed.

17. That all carriers who operate into or through Illinois from any point in the United States will be required to equip their vehicles in accordance with the Illinois Splash Guard statute.

18. That all carriers whose equipment is sent into or through Illinois by virtue of interlining will be required to equip their vehicles in accordance with the Illinois Splash Guard statute.

19. That since it is impossible for a carrier operating in interstate commerce to determine which of its equipment will be used in a particular area, or on a particular day, or days, carriers operating into or through Illinois, or whose equipment may operate into Illinois through interlining will be required to equip all their trailers in accordance with the requirements of the Illinois Splash Guard statute.

20. That because plaintiffs who operate into and through Illinois have no way of compelling carriers with whom they interline to equip their trailers in accordance with the Illinois splash guard statute, they will be forced to cease interlining trailers destined to or through Illinois with carriers who do not comply with Illinois law.

21. That it would be impossible in most cases, and impracticable in others, for plaintiffs to equip trailers obtained by interlining with the splash guard required by Illinois.

22. That the practice of interlining or interchanging trailers is an important means by which plaintiffs serve the [fol. 559] shipping public in accordance with certificates of public convenience and necessity issued to them by the Interstate Commerce Commission, and is vital to the very existence of plaintiffs.

23. That the contour splash guard required by Section 121:02 of the Uniform Act Regulating Traffic on Highways, being Section 218b of Chapter 95½, Illinois Revised Statutes, as amended, by Act approved July 8, 1957, is not intended to nor does it deal with a safety need or problem peculiar to the State of Illinois.

24. That the contour splash guard required in Illinois does not reduce the spray and splash caused by motor vehicles on highways any more effectively than the conventional or straight splash guard permitted in forty-five (45) States, if as well.

25. That because the contour splash guard is difficult to properly affix to the trailer, and because in its position it is peculiarly liable to receive many blows and be subject to vibration, it is particularly liable to come off while the vehicle is in operation, presenting a hazard to oncoming traffic, and creating a difficult and costly maintenance problem for carriers.

26. That since because of the Illinois Contour Splash Guard Act vehicles will be traveling with said guards in all forty-eight (48) States, the danger and safety hazards created by said guard will hinder and obstruct commerce on highways throughout the United States.

27. That because of the shrouding effect of the contour splash guard heat dissipation from air flow around the brake drum is reduced, creating brake fade from overheated brakes.

28. That brake fade increases the distance needed for a vehicle to stop, since the contour guard will be used throughout the United States, a new hazard will be added to highway travel in interstate commerce all over the United States.

29. That plaintiffs are seeking by this action to have the contour splash guard state (sic) of the State of Illinois [fol. 560] declared invalid and unconstitutional as an undue and unreasonable burden and obstruction to the free flow of interstate commerce.

30. That said Illinois Contour Splash Guard Act, while placing a substantial burden and obstruction upon the free flow of interstate commerce, does not contribute to safety in Illinois, and in fact introduces new dangers and hazards to highway travel in Illinois and throughout the United States not hitherto in existence.

II. Conclusions of Law

1. That the matter in controversy exceeds the sum of Three Thousand ($3,000.00) Dollars for each plaintiff and intervener, exclusive of interest and costs and arises under the Constitution and laws of the United States.

2. That this Court has jurisdiction of the parties and the subject matter of this action.

3. That enforcement of Section 121.02 of the Uniform Act Regulating Traffic on Highways, being Section 218b of Chapter 95½, Illinois Revised Statutes, as amended, by Act approved July 8, 1957 requiring that plaintiffs' and intervener's trailers be equipped with contour splash guards, and the Order of the Arkansas Public Service Commission issued December 13, 1957, requiring that plaintiffs' and intervener's trailers be equipped with the straight or conventional splash guards will render it impossible for plaintiffs and intervener to operate the same equipment in both States, thereby obstructing the free flow of commerce in direct violation of the Commerce Clause, Article I, Section 8 of the United States Constitution, and said Illinois Act is, therefore, unconstitutional and invalid.

4. That Section 121.02 of the Uniform Act Regulating Traffic on Highways, being Section 218b of Chapter 95½, Illinois Revised Statutes, as amended, by Act approved July 8, 1957, unduly and reasonably burdens and obstructs the free flow of commerce between the States by making [fol. 561] splash guards which are legal in forty-five (45) States illegal in Illinois, and is, therefore, unconstitutional and invalid as a direct violation of the Commerce Clause, Article I, Section 8 of the United States Constitution.

5. That plaintiffs and intervener are entitled to a permanent injunction enjoining and restraining the defendants, and each of them, their successors in office and their agents, attorneys and employees, and each and every one of them, from enforcing or instituting proceedings to enforce Section 121.02 of the Uniform Act Regulating Traffic on Highways, being Section 218b of Chapter 95½, Illinois Revised Statutes, as amended, by Act approved July 8, 1957 by reason of the fact that said Act is an unreasonable and undue burden and obstruction to the free flow of interstate commerce in violation of the Commerce Clause, Article I, Section 8 of the United States Constitution.

Enter

/s/ J. Earl Major, /s/ Chas. G. Briggle, /s/ Frederick O. Mercer.

Dated: Feb. 26, 1958

[File endorsement omitted]

[fol. 562]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

SOUTHERN DIVISION

Civil Action No. 2438

For Declaratory Judgment and Injunctive Relief

NAVAJO FREIGHT LINES, INC.,
a New Mexico corporation,

RINGSBY TRUCK LINES, INC.,
a Nebraska corporation,

PRUCKA TRANSPORTATION, INC.,
a Nebraska corporation,

DENVER CHICAGO TRUCKING CO., INC.,
a Nebraska corporation, and

PACIFIC INTERMOUNTAIN EXPRESS CO.,
a Nevada corporation, Plaintiffs,

and

ARKANSAS-BEST FREIGHT SYSTEM, INC.,
an Arkansas corporation, Intervenor,

vs.

JOSEPH D. BIBB, Director of the Department of Publ
Safety of the State of Illinois,

and

WILLIAM H. MORRIS, Superintendent of the Division
State Highway Police, Department of Public Safety
the State of Illinois, Defendants.

FINAL ORDER—March 10, 1958

This cause coming on to be heard on the complaint
plaintiffs, Navajo Freight Lines, Inc., Ringsby Truck Line
Inc., Prucka Transportation Inc., Denver Chicago Truckin

Co., Inc., Watson Bros. Transportation Co., Inc. and Pacific Intermountain Express Co., and the intervening petition and complaint of intervenor, Arkansas-Best Freight System, Inc., for a declaratory judgment that Section 121.02 of the Uniform Act Regulating Traffic on Highways, being Sec. 218b of Chap. 95½ (Ill. Rev. Stat.), as amended by Act approved July 8, 1957, is unconstitutional and void and for a permanent injunction enjoining defendants from enforc-[fol. 563] ing or instituting proceedings against plaintiffs under the said Act, the Court having jurisdiction of the parties and the subject matter, being fully advised in the premises having heard the evidence and the arguments of all the parties hereto in open court, having considered the briefs submitted by the parties, and having filed its findings of fact, conclusions of law and opinion on February 26, 1958 holding Section 121.02 of the Uniform Act Regulating Traffic on Highways, being Section 228b of Chapter 95½, Illinois Revised Statutes, as amended by Act approved July 8, 1957 to be unconstitutional and void, as violative of Article I, Section 8, of the Constitution of the United States.

It Is Hereby Ordered, Adjudged and Decreed that the defendants, Joseph D. Bibb, Director of the Department of Public Safety of the State of Illinois, and William H. Morris, Superintendent of the Division of State Highway Police, Department of Public Safety of the State of Illinois, and each of them, their successors in office and their agents, servants, attorneys and employees be and they are hereby permanently restrained and enjoined from enforcing or instituting any proceedings of any kind or nature whatsoever against the plaintiffs or intervenor herein for violations of Section 121.02 of the Uniform Act Regulating Traffic on Highways, being Section 218b of Chapter 95½, Illinois Revised Statutes, as amended, by Act approved July 8, 1957.

Enter:

/s/ Chas. G. Briggle, /s/ Frederick O. Mercer

Dated: March 10th 1958. Indorsed Filed March 19, 1958, G. W. Schwaner, Clerk.

[fol. 564] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS
SOUTHERN DIVISION

Civil Action No. 2438

For Declaratory Judgment and Injunctive Relief

JOSEPH D. BIBB, Director of the Department of Public Safety of the State of Illinois,

and

WILLIAM H. MORRIS, Superintendent of the Division of State Highway Police, Department of Public Safety of the State of Illinois, Appellants,

vs.

NAVAJO FREIGHT LINES, INC.,
a New Mexico Corporation,

RINGSBY TRUCK LINES., INC.,
a Nebraska Corporation,

PRUCKA TRANSPORTATION, INC.,
a Nebraska Corporation,

DENVER CHICAGO TRUCKING CO., INC.,
a Nebraska Corporation,

WATSON BROS. TRANSPORTATION CO., INC.,
a Nebraska Corporation,

PACIFIC INTERMOUNTAIN EXPRESS CO.,
a Nevada Corporation,

ARKANSAS-BEST FREIGHT SYSTEM, INC.,
an Arkansas corporation, Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed May 8, 1958

[fol. 565] Notice is hereby given that Joseph D. Bibb, Director of the Department of Public Safety of the State of

Illinois, and William H. Morris, Superintendent of the Division of State Highway Police, Department of Public Safety of the State of Illinois, appellants above named, hereby appeal to the Supreme Court of the United States from the final order of the said District Court, entered herein on the 19th day of March, 1958, holding Section 121.02 of the Illinois Uniform Act Regulating Traffic on Highways, being Paragraph 228 (b) of Chapter 95½, Illinois Revised Statutes, as amended by Act approved July 8, 1957, to be unconstitutional and void, as violative of Article I, Section 8 of the Constitution of the United States and enjoining appellants and their successors and servants from enforcing said Act.

This appeal is taken pursuant to Act of June 25, 1945, C. 646, 62 Stats. 926, 28 U.S.C., Section 1253.

The Clerk will prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

[fol. 566] 1. Complaint for Declaratory Judgment and Injunction.

2. Notice of Motion for Temporary Restraining Order.

3. Answer.

4. Restraining Order of December 18, 1957.

5. Petition supplementing Complaint in support of Plaintiffs' Motion for Temporary Injunction.

6. Motion and Notice of Motion of Arkansas Motor Freight Lines, Inc., for Leave to Intervene.

7. Proposed Complaint in support of Motion of Arkansas Motor Freight Lines, Inc., for Leave to Intervene.

* * * * * * * *

10. Defendants' Motion to Dismiss at close of Plaintiffs' evidence.

11. Opinion of the Court by Judge Major, Circuit Judge, dated and filed February 26, 1958.

12. Findings of fact and conclusions of law, entered February 26, 1958.

13. Final order, entered March 19, 1958.

14. Entire transcript of proceedings of trial on the merits, filed January 22, 1958.

15. Notice of Appeal to the Supreme Court of the United States.

16. All other documents, papers, pleadings, orders and other matters appearing of record in this cause.

[fol. 567] The following questions are presented by this appeal:

1. Does Section 121.02 of Illinois' Uniform Act Regulating Traffic on Highways (Ill. Rev. Stat. 1957, Ch. 95½, Par. 218 (b), Vol. II, p. 724) requiring contact splash fenders or splash guards over and behind the rear wheels of certain motor trucks and trailers unreasonably burden interstate commerce in violation of Article I, Section 8, of the Constitution of the United States, which provides as follows:

> "The Congress shall have power * * * to regulate commerce among the several States. * * *"

and Article IV, Clause 2, of the Constitution of the United States, which provides as follows:

> "This Constitution * * * shall be the supreme Law of the Land; and the judges in every State shall be bound thereby, and anything in the Constitution or Laws of any State to the contrary notwithstanding."

[fol. 568] 2. Whether the Act is within the police power of the State of Illinois and reserved to the States under the provisions of the Tenth Amendment of the Constitution of the United States.

JOSEPH D. BIBB, Director of the Department of Public Safety of the State of Illinois,

and

WILLIAM H. MORRIS, Superintendent of the Division of State Highway Police, Department of Public Safety of the State of Illinois, Appellants.

By Latham Castle, Attorney General of the State of Illinois, 160 North La Salle Street, Suite 900, Chicago (1) Illinois (Financial 6-2000), Counsel for Appellants.

[fol. 569] Certificate of Service (omitted in printing)

[fol. 570] Clerk's Certificate to Foregoing Transcript (omitted in printing)

SUPREME COURT OF THE UNITED STATES

No. 94—October Term, 1958

JOSEPH D. BIBB, Director of the Department of Public Safety of the State of Illinois, et al., Appellants,

vs.

NAVAJO FREIGHT LINES, INC., a New Mexico Corporation,

RINGSBY TRUCK LINES, INC., a Nebraska Corporation, et al.

ORDER NOTING PROBABLE JURISDICTION—October 13, 1958

Appeal from the United States District Court for the Southern District of Illinois.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

October 13, 1958

KEY TO BRIEFS

1 JURISDICTIONAL STSTEMENT

2 MOTION TO AFFIRM

3 APPELLANTS' BRIEF IN OPPOSITION TO APPELLEES' MOTION TO AFFIRM.

4 BRIEF OF APPELLANTS PRESENTING LATE AUTHORITY UNDER THIS COURT'S RULE 41, PAR. 5.

5 BRIEF FOR APPELLANTS

6 BRIEF FOR APPELLEES

7 REPLY BRIEF FOR APPELLANTS



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JUN 10 1958
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1957.

No. 1060

JOSEPH D. BIBB, Director of the Department of Public Safety of the State of Illinois, and WILLIAM H. MORRIS, Superintendent of the Division of State Highway Police, Department of Public Safety of the State of Illinois,

Appellants,

vs.

NAVAJO FREIGHT LINES, INC., a New Mexico corporation, RINGSBY TRUCK LINES, INC., a Nebraska corporation, PRUCKA TRANSPORTATION, INC., a Nebraska corporation, DENVER CHICAGO TRUCKING CO., INC., a Nebraska corporation, WATSON BROS. TRANSPORTATION CO., INC., a Nebraska corporation, PACIFIC INTERMOUNTAIN EXPRESS CO., a Nevada corporation, ARKANSAS BEST FREIGHT SYSTEM, INC., an Arkansas corporation, and SCHERER FREIGHT LINES, INC., an Illinois corporation,

Appellees.

(APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS, SOUTHERN DIVISION.)

JURISDICTIONAL STATEMENT.

Certificate of Service Appended at Page 25.

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WILLIAM C. WINES,
HAMILTON SHUEY,

INDEX.

	PAGE
Reference to the Official and Unofficial Reports of the Opinions Delivered in the Courts Below	1
Statement of the Grounds on which the Jurisdiction of this Court is Involved	2
The Nature of the Proceedings and the Statute Pursuant to Which It Is Brought	2
The Date of the Judgment Sought To Be Reviewed, The Time of Its Entry, the Date the Notice of Appeal was Filed and The Court In Which It was Filed	2
The Statutory Provision Conferring on This Court Jurisdiction of This Appeal	3
Cases Believed to Sustain the Jurisdiction of this Court	3
The Text and Citation of the Statute Involved	3
The Questions Presented by this Appeal	6
Statement of the Case	7
Grounds Upon Which it is Contended that The Federal Questions are Substantial and that the District Court Abused its Discretion in Granting the Injunction	10
Certificate of Service	16

APPENDICES.

I—Opinion of United States District Court, Southern District of Illinois, Southern Division	1
II—Findings of Fact and Conclusions of Law, United States District Court, Southern District of Illinois, Southern Division	17
III—Order of United States District Court for the Southern District of Illinois, Southern Division	23

CASES AND STATUTES CITED.

Maurer v. Hamilton, 309 U. S. 598, 603 ..... 3, 11
South Carolina Highway Dept. v. Barnwell, Bros., 303 U. S. 177, 190, 191 ..... 3, 10
Sproles v. Binford, 286 U. S. 374 ..... 3, 12
Illinois' Uniform Act Regulating Traffic on Highways (Ill. Rev. Stats. 1957, Ch. 95½, Par. 218 (b), Vol. II, p. 724) 2, 3, 6, 7
Judicial Code, 28 U. S. C.
Sec. 2201, 62 Stat. p. 964, amended 63, Stat. 105 2
Sec. 2281, 62 Stat. p. 968 2
Sec. 2284, 62 Stat. p. 968 2
Sec. 1253, Act of June 25, 1948, C. 646, 62 Stats. 926. 3
Constitution of the United States, Art. I, Sec. 8 6
Art. IV, Clause 2 6

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1957.

No. ,

JOSEPH D. BIBB, Director of the Department of Public Safety of the State of Illinois, and WILLIAM H. MORRIS, Superintendent of the Division of State Highway Police, Department of Public Safety of the State of Illinois,

Appellants,

vs.

NAVAJO FREIGHT LINES, INC., a New Mexico corporation, RINGSBY TRUCK LINES, INC., a Nebraska corporation, PRUCKA TRANSPORTATION, INC., a Nebraska corporation, DENVER CHICAGO TRUCKING CO., INC., a Nebraska corporation, WATSON BROS. TRANSPORTATION CO., INC., a Nebraska corporation, PACIFIC INTERMOUNTAIN EXPRESS CO., a Nevada corporation, ARKANSAS-BEST FREIGHT SYSTEM, INC., an Arkansas corporation, and SCHERER FREIGHT LINES, INC., an Illinois corporation,

Appellees.

JURISDICTIONAL STATEMENT.

Reference to the Official and Unofficial Reports of the Opinions Delivered in the Courts Below.

The opinion of the court below has not yet been reported. It is reprinted in full as Appendix I in this Statement (App., pp. 1-15) and appears in the record at pages 538 to 555 inclusive.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOLVED.

The Nature of the Proceedings and the Statute Pursuant to Which It Is Brought.

This is appellees' suit for a declaratory judgment that Section 121.02 of Illinois' Uniform Act Regulating Traffic on Highways (Ill. Rev. Stats. 1957, Ch. 95½, Par. 218 (b), Vol. II, p. 724, reprinted in full, *post*), which requires contour splash fenders or splash guards over and behind the rear wheels of certain motor trucks and trailers operating in Illinois in both intrastate and interstate commerce, unreasonably burdens interstate commerce and for injunction restraining the enforcement of that Act.

The suit is brought pursuant to Sections 2201, 2281 and 2284 of the Judicial Code (28 U. S. C. Sec. 2201, 62 Stat. p. 964, amended 63 Stat. 105, 28 U. S. C. Sec. 2281, 62 Stat. p. 968, 28 U. S. C. Sec. 2284, 62 Stat. p. 968).

A three-judge district court declared the Act unconstitutional as a burden on interstate commerce and enjoined its enforcement. The court's judgment is reprinted as Appendix III to this Statement. (App., pp. 23-24.)

The Date of the Judgment Sought To Be Reviewed, The Time of Its Entry, the Date the Notice of Appeal was Filed and The Court In Which It Was Filed.

The decree was dated March 10, 1958, and was entered March 19, 1958. (Rec. 563.)

The notice of appeal was filed on May 8, 1958 in the U. S. District Court for the Southern District of Illinois, Southern Division. (Rec. 564-569.)

The Statutory Provision Conferring on This Court Jurisdiction of This Appeal.

This appeal is taken pursuant to Section 1253 of the Judicial Code (28 U. S. C. Sec. 1253, Act of June 25, 1945, C. 646, 62 Stats. 926), which authorizes direct appeals to this Court from judgments of injunction by three-judge district courts.

Cases Believed to Sustain the Jurisdiction of This Court.

The cases believed to sustain the jurisdiction of this Court are:

Maurer v. *Hamilton*, 309 U. S. 598, 603.
South Carolina Highway Dept. v. *Barnwell Bros.*, 303 U. S. 177, 190, 191.
Sproles v. *Binford*, 286 U. S. 374.

The Text and Citation of the Statute Involved.

The validity of the following statutory provisions of the State of Illinois is involved:

218b. Rear fender splash guards.] § 121.02. It is unlawful for any person to operate any motor vehicle of the second division upon the highways of this state outside the corporate limits of a city, village or incorporated town unless such vehicle is equipped with rear fender splash guards which shall comply with the specifications hereinafter provided in this Section; except that any motor vehicle of the second division which is or has been purchased, new or used, prior to August

1, 1957 shall be equipped with rear fender splash guards which are so attached as to prevent the splashing of mud or water upon the windshield of other motor vehicles and such splash guards on such vehicle shall not be required to comply with the specifications hereinafter provided in this Section until January 1, 1958.

The rear fender splash guards shall contour the wheel in such a manner that the relationship of the inside surface of any such splash guard to the tread surface of the tire or wheel shall be relatively parallel, both laterally and across the wheel, at least throughout the top 90 degrees of the rear 180 degrees of the wheel surface; provided however, on vehicles which have a clearance of less than 5 inches between the top of the tire or wheel and that part of the body of the vehicle directly above the tire or wheel when the vehicle is loaded to maximum legal capacity, the curved portion of the splash guard need only extend from a point directly behind the center of the rear axle and to the rear of the wheel surface upwards to within at least 2 inches of the bottom line of the body when the vehicle is loaded to maximum legal capacity. On all vehicles to which this Section applies, there shall be a downward extension of the curved surface which shall end not more than 10 inches from the ground when the vehicle is loaded to maximum legal capacity. This downward extension shall be part of the curved surface or attached directly to said curved surface, but it need not contour the wheel.

The splash guards shall be wide enough to cover the full tread or treads of the tires being protected and shall be installed not more than 6 inches from the tread surface of the tire or wheel when the vehicle is loaded

to maximum legal capacity. The splash guard shall have a lip or flange on its outside edge to minimize side throw and splash. The lip or flange shall extend toward the center of the wheel, and shall be perpendicular to and extend not less than 2 inches below the inside or bottom surface line or plane of the guard.

The splash guards may be constructed of a rigid or flexible material, but shall be attached in such a manner that, regardless of movement, either by the splash guards or the vehicle, the splash guards will retain their general parallel relationship to the tread surface of the tire or wheel under all ordinary operating conditions.

This Section shall not apply to motor vehicles whose construction or design does not require such splash guards, nor to motor vehicles in-transit and capable only of using temporary splash guards approved by the Illinois State Highway Police.

This Section shall not apply to motor vehicles which do not have more than 2 axles and which are used primarily in agricultural pursuits, nor to pole trailers, dump trucks, "ready-mix" type of cement trucks, nor to trucks used primarily for transporting grain which are dumped or unloaded by use of hoists or lifts, nor to vehicles operated principally off the highways of this state and used primarily in public construction or for purposes associated with or in aid of drilling, mining or otherwise severing of natural resources from their natural depository nor to motor vehicles operated principally within the corporate limits of a city, village or incorporated town or within a short radius thereof; provided, the Department of Public Safety may, in order to promote greater safety on the highways of this State and accomplish the purposes

of this Section, adopt and promulgate reasonable rules and regulations establishing specifications or designs for splash guards, other than the contour type of splash guard hereinbefore specified, to be used on the vehicles mentioned in this paragraph while said vehicles are operated on the highways of this State. In adopting or promulgating any such rules or regulations, the Department of Public Safety shall consider, among other things, the type of vehicle, the design or construction of the vehicle, the purpose or purposes for which the vehicle is used, the conditions or circumstances under which the vehicle operates and the distance the vehicle travels upon the highways of this State. As amended by act approved July 8, 1957. L. 1957, p. 1951, H.B. No. 157.

Section added: L. 1951, p. 942.

THE QUESTIONS PRESENTED BY THIS APPEAL.

A. Does Section 121.02 of Illinois' Uniform Act regulating traffic on Highways (Ill. Revised Stats. 1957, Chap. 95½, Par. 218b, Vol. II, p. 724), requiring contact splash fenders or splash guards over and behind the rear wheels of certain motor trucks and trailers, unreasonably burden interstate commerce in violation of Article I, Section 8, of the Constitution of the United States, which provides as follows:

> "The Congress shall have power . . . to regulate commerce among the several States. . . ."

and Article IV, Clause 2, of the Constitution of the United States, which provides as follows:

> "This Constitution . . . shall be the supreme Law of the Land; and the judges in every State shall be bound

thereby, and anything in the Constitution or Laws of any State to the contrary notwithstanding."?

B. Is the Act within the police power of the State of Illinois reserved to the States under the provisions of the Tenth Amendment to the Constitution of the United States?

STATEMENT OF THE CASE.

Appellees, corporations operating trucks with trailers in interstate commerce and in Illinois under certificates of public convenience and necessity issued by the Interstate Commerce Commission, filed this suit to restrain the enforcement of an Illinois statute enacted in 1957 which requires "contour" mud guards on trucks and trailers in Illinois. (Ill. Rev. Stat. 1957, Ch. 95½, Par. 218b, Vol. 2, p. 724, reprinted in full, *ante*, pp. 3-6.) The specifications required by the statute set forth in its text are thus summarized by the District Court:

> "The Act under attack, entitled 'rear fender splash guards', provides:
>
> > 'It is unlawful for any person to operate any motor vehicle * * * upon the highways of this state * * * unless such vehicle is equipped with rear fender splash guards which shall comply with the specifications hereinafter provided in this Section * * *'.
>
> "The specifications require that the splash guards (1) contour under the wheel; (2) cover the top 90° of the rear 180° (excepting vehicles of less than five inches clearance, and requiring that they contour within ten inches of the body); (3) extend downward to within

ten inches of the ground; (4) have a lip or flange of two inches upon the outside edge, and (5) retain its general parallel condition under all operating conditions when mounted as required by the statute not more than six inches from the tread when fully loaded." (*Opinion*, Appendix I, p. 2.)

A three-judge District Court, having granted a temporary injunction restraining the enforcement of the statute, made that injunction permanent by final decree. The Court's memorandum of opinion (Rec. 538) appears as Appendix I to this Statement (App., pp. 1-16, *post*). That Court's Findings of Fact and Conclusions of Law (Rec. 556-561) appear as Appendix II (App., pp. 17-22). The decree appealed from (Rec. 562) appears as Appendix III (App., pp. 23-24).

In substance, the District Court found that compliance with the Act for vehicles used by appellees would cost each of them in excess of $3,000, that the Arkansas Public Service Commission has issued an order requiring that all vehicles using Arkansas highways be equipped with flat, apron type mudguards parallel to the rear axle, that it is impossible for a splash guard to comply with the Illinois Splash Guard Act and the Arkansas Public Service Commission order, that splash guards permitted in forty-five states are illegal in Illinois, that each of appellees interchanges trailers with carriers throughout the United States, that it will be impractical and in some cases impossible for plaintiffs to equip trailers with the splash guards required by Illinois and that the Act unreasonably burdens interstate commerce (Findings of Fact, App. II, App.).

The District Court also found that if the contour type mud guards become detached from the vehicle upon which they are mounted, they create a hazard upon public highways (Rec. 559).

The District Court therefore found the Act an unreasonable burden on interstate commerce (Rec. 555).

The evidence for appellants, not summarized in the Court's opinion or reflected in its Findings of Fact, is that a plastic contour splash guard when backed into an object such as a loading ramp or post (Rec. 304) snaps back into position and is not damaged. Even when a plastic contour splash guard was subjected to ten times the vibration that you would get on the road, it was not damaged (Rec. 308).

A contour splash guard, unlike a "flat" or "apron" type mud guard, will throw debris down instead of straight out (Rec. 322). When one is driving behind a unit that has inadequate splash guards, mud and water is thrown all over the windshield of a following vehicle with momentary loss of vision. When one loses vision he drops the left side of his car off the paved area of the road and many accidents are caused by trying to right the car from such rolling (Rec. 325).

Contour splash guards prevent mud and water from splashing upon and obstructing stop and flicker lights and license plates (Rec. 340).

They can be installed for about $10 a set (Rec. 341). When the front vehicle is equipped with contour guards, a

vehicle following can drive within twenty or thirty feet of the unit with no trouble in keeping the windshield clean (Rec. 354).

A Captain of the Illinois State Highway Police testified that no accidents had been caused by contour splash guards (Rec. 356).

GROUNDS UPON WHICH IT IS CONTENDED THAT THE FEDERAL QUESTIONS ARE SUBSTANTIAL AND THAT THE DISTRICT COURT ABUSED ITS DISCRETION IN GRANTING THE INJUNCTION.

The District Court has stricken down a measure enacted by Illinois for the prevention of accidents upon that State's highways. It has substituted its judgment for that of the Illinois legislature as to the type of mud guard ~~plaintiffs~~ adapted to prevent collision and other accidents upon the roads of Illinois.

In *South Carolina Highway Department v. Barnwell Bros., Inc.*, 303 U. S. 161, this Court, overturning the decision of a three-judge district court, held valid the provisions of a South Carolina statute prohibiting the "use on state highways of motor trucks and 'semi-trailer motor trucks' whose width exceeds ninety inches, and whose weight including load exceeds twenty thousand pounds."

The Court said at page 189:

> "The nature of the authority of the state over its own highways has often been pointed out by this Court. It may not, under the guise of regulation,

discriminate against interstate commerce. But 'In the absence of national legislation especially covering the subject of interstate commerce, the State may rightly prescribe uniform regulations adapted to promote safety upon its highways and the conservation of their use, applicable alike to vehicles moving in interstate commerce and those of its own citizens.' *Morris* v. *Duby*, 274 U. S. 135, 143. This formulation has been repeatedly affirmed, *Clark* v. *Poor*, 274 U. S. 554, 557; *Sprout* v. *South Bend*, 277 U. S. 163, 169; *Sproles* v. *Binford*, 286 U. S. 374, 389, 390; cf. *Morf* v. *Bingaman*, 298 U. S. 407, and never disapproved. This Court has often sustained the exercise of that power although it has burdened or impeded interstate commerce. It has upheld weight limitations lower than those presently imposed, applied alike to motor traffic moving interstate and intrastate. *Morris* v. *Duby*, *supra*; *Sproles* v. *Binford*, *supra*. Restrictions favoring passenger traffic over the carriage of interstate merchandise by truck have been similarly sustained, *Sproles* v. *Binford*, *supra*; *Bradley* v. *Public Utilities Comm'n*, 289 U. S. 92, as has the exaction of a reasonable fee for the use of the highways. *Hendrick* v. *Maryland*, 235 U. S. 610; *Kane* v. *New Jersey*, 242 U. S. 160; *Interstate Busses Corp.* v. *Blodgett*, 276 U. S. 245; *Morf* v. *Bingaman*, *supra*; cf. *Ingels* v. *Morf*, 300 U. S. 290."

In *Maurer* v. *Hamilton*, 309 U. S. 598, this Court sustained as to trucks traveling in interstate commerce a statute of Pennsylvania "prohibiting the operation over its highways of any motor vehicle carrying any other vehicle over the head of the operator of such carrier vehicle." The Court

sustained this statute notwithstanding the Motor Carrier Act of 1935.

The Court said at pages 603-04:

> "Only a word need be said of the constitutional objections. The present record lays a firm foundation for the exercise of state regulatory power, unless the state has been deprived of that power by Congressional action authorizing the Commission to substitute its judgment for that of the state legislature as to the need and propriety of the state regulation. The nature and extent of the state power, in the absence of Congressional action, to regulate the use of its highways by vehicles engaged in interstate commerce has so recently been considered by this Court that it is unnecessary to review the authorities now, or to restate the standards which define the state power to prescribe regulations adapted to promote safety upon its highways and to insure their conservation and convenient use by the public. See *South Carolina Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177. Judged by these standards we can find no basis for saying that the Pennsylvania statute is not such a regulation or that it is a denial of due process or that it infringes the commerce clause if Congress has not authorized the Interstate Commerce Commission to promulgate a conflicting rule."

In *Sproles* v. *Binford*, 286 U. S. 374, this Court sustained as to trucks traveling in interstate commerce provisions of the Motor Vehicle Act of Texas prohibiting "the operation on any highway of 'any vehicle' as defined, exceeding stated limitations of size, or any vehicle not constructed or equipped as required, and also the transportation of

any load exceeding the dimensions and weights prescribed."

After holding that the Act did not deprive appellants of their property without due process of law (no question of due process is raised in the instant case), the Court, speaking through Chief Justice Hughes, said at pages 389-90:

> "The objection to the prescribed limitation as repugnant to the commerce clause is also without merit. The Court, in *Morris* v. *Duby, supra*, at p. 143, answered a similar objection to the limitation of weight by the following statement, which is applicable here: 'An examination of the acts of Congress discloses no provision, express or implied, by which there is withheld from the State its ordinary police power to conserve the highways in the interest of the public and to prescribe such reasonable regulations for their use as may be wise to prevent injury and damage to them. In the absence of national legislation especially covering the subject of interstate commerce, the State may rightly prescribe uniform regulations adapted to promote safety upon its highways and the conservation of their use, applicable alike to vehicles moving in interstate commerce and those of its own citizens.' In the instant case, there is no discrimination against interstate commerce and the regulations adopted by the State, assuming them to be otherwise valid, fall within the established principle that in matters admitting of diversity of treatment, according to the special requirements of local conditions, the States may act within their respective jurisdictions until Congress sees fit to act."

We need not multiply citations for the proposition, enunciated in the three cases cited above, that a State may

adopt reasonable regulations as to the equipment to be used on its highways and such regulations may extend to vehicles traveling in interstate as well as intrastate commerce.

The evidence for appellants showed *without contradiction* that contour mudguards, *unlike flat or apron type mudguards*, will throw debris downward instead of laterally, that they will prevent the obscuring of rear lights and license plates and that when a vehicle is equipped with contour guards, a vehicle following can drive within twenty or thirty feet of the forward vehicle "with no trouble in keeping windshield clean." (Rec. 354.)

The appellants' evidence showed *without contradiction* that when one is driving behind a unit that has inadequate splash guards, mud and water is thrown all over the windshield of the vehicle following with loss of vision and that many accidents, both to single vehicles which go off the road and involving collisions, as a result of this loss of vision. (Rec. 324.)

The question propounded is one of legislative, not judicial, discretion.

Only a word need be said as to the Arkansas regulation, which requires a flap type of mudguard. The evidence shows that with a few possible exceptions, it is possible to change mudguards in interstate transit. (Rec. 113.) While some delay will be occasioned by this change of mudguards, delay is a small price to pay for minimization of accidents upon the public highway.

These considerations demonstrate that the statute is a reasonable exercise of the State's police power, that the district court has departed from the constitutional norms apposite to the questions presented, that it has made a legislative, not a judicial demonstration of those questions and that it has improperly granted the injunction appealed from.

Respectfully submitted.

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Of Counsel.

APPENDIX I.

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS
SOUTHERN DIVISION

Navajo Freight Lines, Inc.,
a New Mexico corporation,
Ringsby Truck Lines, Inc.,
a Nebraska corporation,
Prucka Transportation, Inc.,
a Nebraska corporation,
Denver Chicago Trucking Co., Inc.,
a Nebraska corporation,
Watson Bros. Transportation Co., Inc.,
a Nebraska corporation and
Pacific Intermountain Express Co.,
a Nevada corporation,
Plaintiffs,

and

Arkansas-Best Freight System, Inc.,
an Arkansas corporation,
Intervenor,

vs.

Joseph D. Bibb, Director of the Department of Public Safety of the State of Illinois,

and

William H. Morris, Superintendent of the Division of State Highway Police, Department of Public Safety of the State of Illinois,
Defendants.

Civil Action
No. 2438
For Declaratory
Judgment and
Injunctive
Relief

February 26, 1958

Before MAJOR, Circuit Judge, BRIGGLE and MERCER, District Judges.

MAJOR, Circuit Judge. Plaintiffs instituted this proceeding, praying for a declaratory judgment that Sec. 121.02

of the Uniform Act Regulating Traffic on Highways, being Sec. 218b of Chap. 95½, as amended (Ill. Rev. Stat.), effective July 8, 1957 (hereinafter referred to as the Act), be held unconstitutional and void, and that defendants be enjoined from enforcing or instituting proceedings against plaintiffs under the Act. Arkansas-Best Freight System, Inc. was granted leave to intervene. The District Court issued a temporary restraining order.

On January 15, 1958, a three-Judge Court was convened in accordance with the requirements of Title 28 U. S. C. A. Sec. 2284. On January 15 and 16, 1958, the Court heard testimony offered by the respective parties, as well as argument of counsel, at the conclusion of which the matter was taken under advisement.

The Act under attack, entitled "Rear fender splash guards," provides:

> "It is unlawful for any person to operate any motor vehicle * * * upon the highways of this state * * * unless such vehicle is equipped with rear fender splash guards which shall comply with the specifications hereinafter provided in this Section * * *."

The specifications require that the splash guards (1) contour under the wheel; (2) cover the top 90° of the rear 180° (excepting vehicles of less than five inches clearance, and requiring that they contour within two inches of the body); (3) extend downward to within ten inches of the ground; (4) have a lip or flange of two inches upon the outside edge, and (5) retain its general parallel condition under all operating conditions when mounted as required by the statute not more than six inches from the tread when fully loaded.

Plaintiffs named in the caption are all corporations organized and existing under laws of states other than Illinois. They are all engaged in the transportation of property by motor vehicle as a common carrier in interstate commerce generally over regular routes. They all operate pursuant to a certificate of public convenience and necessity issued by the Interstate Commerce Commission. None of plaintiffs other than Watson Bros. rendered any intrastate transportation in Illinois and hold no authority from the Illinois Commerce Commission to operate in such commerce. Watson Bros. operates to a limited extent in intrastate com-

merce in Illinois, for which it holds authority from the Illinois Commerce Commission.

Joseph D. Bibb is director of the Department of Public Safety of the State of Illinois, which department maintains the division known as the State Highway Police, of which defendant William H. Morris is Superintendent. These officials are charged with the duty and responsibility of enforcing the provisions of the Uniform Act Regulating Traffic on Highways, including the section involved in this proceeding.

Notwithstanding our findings of fact and conclusions of law entered concurrently with this opinion, we deem it advisable to elaborate on the factual as well as the legal situation. Navajo Freight Lines, Inc. (hereafter Navajo) is a New Mexico corporation with its principal office at Denver, Colorado. It operates between points in the states of Arizona, California, Colorado, Illinois, Indiana, Iowa, Kansas, Missouri, Nebraska, Nevada, New Mexico, Oklahoma and Texas. It operates approximately 32 million miles per year in interstate commerce, with 7% of its mileage over Illinois highways. Ringsby Truck Lines, Inc. (hereafter Ringsby) is a Nebraska corporation and operates between points in the states of California, Colorado, Illinois, Iowa, Kansas, Missouri, Nebraska, Nevada, Utah and Wyoming. It operates approximately 30 million miles per year in interstate commerce, of which 3% is over Illinois highways. Prucka Transportation, Inc. (hereafter Prucka) is a Nebraska corporation and operates between points in the states of Colorado, Illinois, Indiana, Iowa, Kansas, Missouri, Nebraska and Wyoming. It operates approximately 5 million miles per year in interstate commerce, of which 5% is over Illinois highways. Denver Chicago Trucking Co., Inc. (hereafter Denver) is a Nebraska corporation operating between points in the states of Arizona, California, Colorado, Connecticut, Idaho, Illinois, Indiana, Kansas, Massachusetts, Michigan, Missouri, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Utah, Washington and Wyoming. It operates approximately 57 million miles per year in interstate commerce, of which approximately 4% is over Illinois highways. Watson Bros. Transportation Co., Inc. (hereafter Watson) is a Nebraska corporation and operates between points in the states of Arizona, California, Colorado, Illinois, Iowa,

Kansas, Minnesota, Missouri, Nebraska, New Mexico, and Wyoming. It operates approximately 58 million miles per year in interstate commerce, of which 7% is over Illinois highways. Pacific Intermountain Express Co. (hereafter Pacific) is a Nevada corporation and operates between points in California, Colorado, Idaho, Illinois, Indiana, Kansas, Missouri, Montana, Nevada, Oregon, Utah, Washington and Wyoming. It operates approximately 90 million miles per year, of which 3% is over Illinois highways.

Each of the plaintiffs is at present operating its trailers with what is termed the conventional or straight mud or splash guard which is recognized as legal in all the forty-eight states other than Illinois. Each of the plaintiffs, in order to operate in Illinois, will be required to equip its trailers with the contour type splash guard required by the Illinois Act, the cost of which is $30 or more per vehicle. Navajo will be required to make such installation on approximately 733 trailers, at a cost of $21,990; Ringsby, on approximately 468 trailers, at a cost of $14,040; Prucka, on approximately 150 trailers, at a cost of $4,500; Denver on approximately 750 trailers, at a cost of $22,500; Watson, on approximately 1528 trailers, at a cost of $45,840; Pacific, on approximately 1200 trailers, at a cost of $36,000. Moreover from two to four hours of labor are required to install or remove a contour splash guard. The expense incident to maintenance and replacement is heavy.

The service rendered by plaintiffs requires that they interchange trailers, and for many years this has been the practice. For example, a carrier which serves between Portland, Oregon and Denver, Colorado, will handle and originate a trailer load of perishable commodities destined for Chicago. The original carrier will move the trailer from Portland to Denver and then deliver it, without transferring the load, for movement to destination via any one of the plaintiffs herein. This interchange service constitutes a substantial proportion of the transportation business of each of the plaintiffs, ranging from 30% to 65%. For example, in the year 1956, the revenue derived by Pacific from traffic which moved through its Chicago terminal amounted to approximately $3,182,000. The revenue derived by Watson for the month of May, 1957, moving through its Chicago terminal, amounted to approximately $1,000,000, of which more than one-third was on traffic

moved into the Chicago terminal from points outside of the state of Illinois. It derived revenue in the same month from freight moving through its Peoria, Illinois, terminal of approximately $107,000, of which about one-third was from freight moving into Peoria from points outside of the state of Illinois. Other plaintiffs received comparable revenue from interchange traffic passing through Illinois.

This interchange of traffic is necessary and essential for the efficient and prompt service which plaintiffs are required to render. More than that, a considerable portion of the service required of plaintiffs could not otherwise be rendered. For instance, plaintiffs render transportation service to the United States Government, including the transportation of explosives which are required to be handled in sealed trailers which cannot be opened until delivered. This service in the main could not be rendered absent the ability of the originating carrier to interchange with other carriers. Plaintiffs also carry substantial amounts of commodities which because of their nature, such as their size or weight, or because they are perishable, cannot be physically transferred from one trailer to another without damage and delay. Again, proper service can be rendered only because plaintiffs are able to interchange trailers, carrying such shipments, with other carriers which are authorized to complete the journey to the point of the shipment's destination. More than that, many shippers and consignees specify in their bills of lading that the commodity which they ship must remain in the same trailer until it reaches its destination.

This statement, so far, is in the main a brief resumé of the factual allegations of the complaint either admitted or not disputed by defendants. It should also be noted, and this is without dispute, that each of the plaintiffs upon entering Illinois is required not only to equip a trailer owned by it so as to comply with the Illinois Act, but is also required to equip a trailer in use by it but owned by another carrier. This it has no right to do without the specific authority of the other carrier.

We were led to believe at the time of the hearing, and still believe, that all of the states, except Illinois and perhaps Oregon and Idaho, require nothing more than the conventional or straight mud flap, none of which would comply

with the Illinois Act. During oral argument the followi
colloquy took place between Judge Briggle and Mr. Huste
counsel for defendants:

"Judge Briggle: In other words, the Illinois Act
for 48 states, there is no other state that would be a
ceptable in Illinois?

Mr. Husted: No.

Judge Briggle: You say Illinois would be accep
able in those states?

Mr. Husted: Yes.

Judge Briggle: But no one of those is acceptab
in Illinois, therefore, Illinois' act must be complied wi
by 48 states?

Mr. Husted: That is true."

Later, counsel modified his answers by stating that t
splash guard provided by Oregon and Idaho would be a
ceptable in Illinois. In the written brief subsequently file
counsel brands as untrue "plaintiffs' contention that 'spla
guards which are permitted in all other states are illeg
in Illinois' and that 'the Attorney General admits this as
45 states.'" The argument proceeds:

"As above explained, almost all of the states whi
have anti-splash statutes require a cover or fender a
certain ones permit the old style flap as an alternati
or stop-gap measure. *The fenders required by the
other states are legal in Illinois.* [Italics ours.]"

As we understand this statement, counsel for defendan
now claim that splash guards or fenders required by oth
states would be recognized by Illinois. It is difficult to b
lieve that such a concession was intended. If so, there is
reason for this law suit in which plaintiffs seek to invalida
the Illinois Act which prevents them for entering Illino
equipped with mud flaps in accordance with the laws of t
states of their respective domiciles.

It was also conclusively shown that the contour mu
flap possesses no advantages over the conventional
straight mud flap previously required in Illinois and pre
ently required in most of the states. Counsel for defen
ants in oral argument substantially so conceded, as ev
denced by the following statement, "There was a weal

of testimony to the effect that in their opinion the old style were better and were preferable and were cheaper and were longer lived, but nobody said that it bore no relation, no reasonable relation to the end sought." In connection with this admission it should be noted that counsel consistently throughout the hearing took the position that such comparison was irrelevant, objected to the admission of such testimony and for the same reason, we assume, offered no testimony on this point in rebuttal.

The intervenor, Arkansas-Best Freight System, Inc., is an Arkansas corporation and is engaged in the transportation of property by motor vehicle as a common carrier in interstate commerce between points in the states of Arkansas, Kansas, Missouri, Illinois, Louisiana and Texas, pursuant to a certificate of public convenience and necessity. The greater part of its operations over Illinois highways involves the transportation of property moving in interstate commerce.

On December 13, 1957, the Arkansas Public Service Commission entered an order which requires that trailers operating on Arkansas highways be equipped with "a perpendicular, flexible type mud guard hanging at a right angle from the trailer." Since the Illinois Act requires that the splash guard contour the wheel, it is evident that a single splash guard cannot satisfy the requirements of both states. It is, therefore, hardly open to doubt that use by intervenor of a splash guard which meets the requirements of the state of its domicile would be unlawful and not permitted in the state of Illinois. Conversely, a trailer equipped with a mud flap in accordance with the Illinois requirement would not be permitted in the state of Arkansas and its use in that state would be unlawful. In fact, a driver-employe of intervenor engaged in the operation of a trailer upon a public highway in Illinois was, on January 2, 1957, arrested and charged with a violation of the Illinois Act. A hearing on the charge was continued, pending the result of this litigation.

Intervenor's Director of Labor and Safety testified as to the situation resulting from the conflict in the requirements imposed by the two states. In response to the suggestion that a trailer at the state line might be stopped and equipped to comply with the Illinois Act, the witness stated:

"* * * that would entail quite a maintenance program and a terrific additional maintenance cost because we do all our maintenance work, all our major maintenance work at our Little Rock shop, and other points such as St. Louis and Fort Smith are merely emergency service points."

The witness also testified as to the problem presented in complying with the Illinois Act, with trailers received from other carriers in exchange and with trailers loaded with explosives:

"* * * we haul explosives from the Red River Arsenal in Texarkana, and there is one specific carrier I can think of now, Red Ball Motor Freight, who operates primarily in Louisiana and Texas. They also haul a lot of explosives out of there, and when that arsenal calls our Texarkana terminal manager to come out and get 'x' number of loads, they do not take in regard whose trailer it is, but they merely load so many trailers going in our direction, and we go out there and pull those trailers. If they were to load those on a Red Ball Trailer, and Red Ball, being a Texas domiciled carrier, we would be all right with his mud flap until we got to the Illinois line. Then we would have to stop there and add the contour mudflap, operate it east of St. Louis, and when it returns to St. Louis, we would have to remove it and the contour mud flap, having to be welded, we would have quite a problem welding them on and several days later going in there and attempting to take them off.

"Further, under the interchange carrier agreement, we would have to contact Red Ball Motor Freight in Dallas, Texas, and receive their authority to add this contour mudflap to their pieces of equipment.

* * *

"Q. With a load of explosives, would you be in a position to weld the contour mudflap on the trailer?

A. Definitely not.

Q. Why?

A. Because of the danger of explosion, fire, and things of that nature."

A witness for Watson described the problem presented by an attempt to comply with the Illinois Act, as follows:

> "Any time you stop a trailer to do anything to it, it disrupts the service. Motor carriers exist on a fast, efficient transportation service and, if we were required to stop a trailer, assuming we had permission to install the mudflap on a foreign trailer, that is, a connecting line trailer, if we were required to stop that trailer at some state line or some garage to install a contour mudflap, there is bound to be delay which restricts the kind and type of motor carrier service we have been providing for years."

It would unduly prolong this opinion to quote further from the testimony. It is sufficient to state that the testimony of the witnesses just quoted finds abundant corroboration in the record. In fact, the seriousness of the problem to interstate motor carriers is not challenged by defendants. Rather, the state takes the position that it is not concerned with the problem or the difficulty with which such carriers are presented. It is significant that during the hearing, including the argument, no practical or reasonable suggestion was made as to how the Act could be complied with.

Congress has not seen fit to exercise its constitutional power to legislate relative to splash guards on trailers engaged in interstate commerce. The importance of uniformity would seem to suggest the desirability of such legislation. However, in its absence the question arises as to what protection, if any, is afforded by the commerce clause of the Constitution. Defendants do not and could not dispute but that enforcement of the Act would impose some burden upon interstate commerce. Their position, however, is, as we understand, that such burden is immaterial in view of the fact that the Act is non-discriminatory as between intra- and interstate commerce, and further, that the Act is a reasonable exercise by the legislature of its police power, inasmuch as its purpose is to provide for the safety of persons an motor vehicles using the highways. Plaintiffs contend that the burden imposed upon commerce is of such magnitude as to entitle them to protection under the commerce clause, that it is greater than can be justified under the police power and without merit as a safety measure.

We gather from a study of the cases that the conflicting interest between the federal and state governments must be resolved in accordance with the facts of each case. It is our firm conviction, under the proof, that enforcement of the Act would impose not merely some but a tremendous burden upon interstate commerce. Particularly is this so as to commerce between the states of Illinois and Arkansas; in fact, commerce between those two states would be stymied to the extent that its future existence would be imperiled, if not obliterated. More than that, the same insurmountable burden would be imposed upon commerce between Illinois and any other state or states which might see fit to do as Arkansas has done, that is, exclude trailers equipped with the contour splash guard required by the Act. Furthermore, we are convinced that little, if anything, can be claimed for the Act as a safety measure. We have already noted the concession that the weight of the evidence is to the effect that the contour possesses no advantages over the straight or conventional mud flap. While there is some proof of advantages possessed by the contour flap, there is also proof of its disadvantages. In fact, there is rather convincing testimony that use of the contour flap creates hazards previously unknown to those using the highways.

Plaintiffs, in support of the contention that the Act should be held unconstitutional, rely upon *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761, and *Morgan* v. *Virginia*, 328 U. S. 373. Defendants, in opposition thereto, rely upon *South Carolina State Highway Department, et al.* v. *Barnwell Brothers, Inc., et al.*, 303 U. S. 177, and *Maurer, et al.* v. *Hamilton*, 309 U. S. 598.

In the *Southern Pacific* case, the Court held unconstitutional the Arizona Train Limit Law which made unlawful operation within the state of a passenger train of more than fourteen cars or a freight train of more than seventy cars. In doing so it reversed the Supreme Court of Arizona which had sustained the Act as a safety measure within the police power of the legislature to enact. It can hardly be doubted but that the reasoning of the Court in Southern Pacific, if applicable, strongly supports plaintiffs' contention in the instant case. Defendants, however, deny its applicability on the ground that the statute there under consideration related to transportation by railroad, while in the instant case it relates to transportation by motor carrier, relying upon the *Barnwell* and *Hamilton* cases.

In these cases the Supreme Court sustained the validity of state legislation regulating motor traffic within the state. In *Barnwell*, the legislation prohibited the use on the state highways of South Carolina of motor trucks whose width exceeded 90" and whose weight included a load in excess of 2000#. In *Hamilton*, the Court sustained the validity of a Pennsylvania statute which prohibited the operation on the highways of the state of any vehicle carrying any other vehicle "above the cab of the carrier vehicle or over the head of the operator of such carrier vehicle." Undoubtedly, Barnwell and Hamilton stand for the proposition that a state in the exercise of its police power has greater latitude in the regulation of motor vehicles than it does of railroads. This is because the former generally is concerned with matters of local interest while the latter more often is concerned with the national interest.

In *Barnwell*, the Court stated (page 185):

> "* * * it has been recognized that there are matters of local concern, the regulation of which unavoidably involves some regulation of interstate commerce but which, because of their local character and their number and diversity, may never be fully dealt with by Congress. Notwithstanding the commerce clause, such regulation in the absence of Congressional action has for the most part been left to the states by the decisions of this Court, subject to the other applicable constitutional restraints."

Further, the Court stated (page 187):

> "Few subjects of state regulation are so peculiarly of local concern as is the use of state highways. There are few, local regulation of which is so inseparable from a substantial effect on interstate commerce. Unlike the railroads, local highways are built, owned and maintained by the state or its municipal subdivisions. The state has a primary and immediate concern in their safe and economical administration. The present regulations, or any others of like purpose, if they are to accomplish their end, must be applied alike to interstate and intrastate traffic both moving in large volume over the highways. The fact that they affect alike shippers in interstate and intrastate commerce in large numbers within as well as without the state is a safeguard against their abuse."

Thus, the Court treated the weight and width requirements as of local concern even though they affected interstate commerce. It was on this premise that the Court held the Act constitutional and stated that the inquiry under the commerce clause was whether the state legislature in adopting the regulations under attack (page 190) "has acted within its province, and whether the means of regulation chosen are reasonably adapted to the end sought."

The *Hamilton* case also treated the statute under attack as relating to a matter of local concern. The Court pointed out (page 605):

> "The width, grades, curves, weight-bearing capacity, surfacing and overhead obstructions of the highways differ widely in the forty-eight different states and in different sections of each state. There are like variations with respect to congestion of traffic. State regulation, developed over a period of years, has been directed to the safe and convenient use of the highways and their conservation with reference to varying local needs and conditions."

This appraisement of Barnwell and Hamilton appears to have been recognized by the Supreme Court in the later cases of *Southern Pacific Co.* and *Morgan*. For instance, in the *Southern Pacific* case (page 767) the Court stated:

> "When the regulation of matters of local concern is local in character and effect, and its impact on the national commerce does not seriously interfere with its operation, and the consequent incentive to deal with them nationally is slight, such regulation has been generally held to be within state authority." [Citing the *Barnwell* and *Hamilton* cases.]

In contrast, the Court on the same page stated:

> "But ever since *Gibbons* v. *Ogden*, 9 Wheat. 1, the states have not been deemed to have authority to impede substantially the free flow of commerce from state to state, or to regulate those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority."

The Court also stated (page 781):

> "More recently in *Kelly* v. *Washington*, 302 U. S. 1, 15, we have pointed out that when a state goes beyond

safety measures which are permissible because only local in their effect upon interstate commerce, and 'attempts to impose particular standards as to structure, design, equipment and operation [of vessels plying interstate] which in the judgment of its authorities may be desirable but pass beyond what is plainly essential to safety and seaworthiness, the State will encounter the principle that such requirements, if imposed at all, must be through the action of Congress which can establish a uniform rule. Whether the State in a particular matter goes too far must be left to be determined when the precise question arises.'"

The Court further stated (page 779):

"The principle that, without controlling Congressional action, a state may not regulate interstate commerce so as substantially to affect its flow or deprive it of needed uniformity in its regulation is not to be avoided by 'simply invoking the convenient apologetics of the police power,' *Kansas City Southern R. Co.* v. *Kaw Valley District*, 233 U. S. 75, 79 • • •."

This distinction drawn between regulations concerned with local matters and those involving the national interest is emphasized in the *Morgan* case, wherein the Court held unconstitutional an Act of Virginia which required passenger motor vehicle carriers, both interstate and intrastate, to separate without discrimination the white and colored passengers in their motor buses. First the Court discussed the test to be applied in determining whether a state statute is invalid as imposing an undue burden upon commerce. The Court stated (page 377):

"The precise degree of a permissible restriction on state power cannot be fixed generally or indeed not even for one kind of state legislation, such as taxation or health or safety. There is a recognized abstract principle, however, that may be taken as a postulate for testing whether particular state legislation in the absence of action by Congress is beyond state power. This is that the state legislation is invalid if it unduly burdens that commerce in matters where uniformity is necessary—necessary in the constitutional sense of useful in accomplishing a permitted purpose. Where uniformity is essential for the functioning of commerce,

a state may not interpose its local regulation. Too true it is that the principle lacks in precision. Although the quality of such a principle is abstract, its application to the facts of a situation created by the attempted enforcement of a statute brings about a specific determination as to whether or not the statute in question is a burden on commerce. Within the broad limits of the principle, the cases turn on their own facts."

The Court, commencing on page 378, cites many cases in support of three propositions:

(1) "In the field of transportation, there has been a series of decisions which hold that where Congress has not acted and although the state statute affects interstate commerce, a state may validly enact legislation which has predominantly only a local influence on the course of commerce. [Citing *Barnwell* and *Hamilton.*]"

(2) "It is equally well settled that, even where Congress has not acted, state legislation or a final court order is invalid which materially affects interstate commerce. [Citing *Southern Pacific.*]"

"(3) "Because the Constitution puts the ultimate power to regulate commerce in Congress, rather than the states, the degree of state legislation's interference with that commerce may be weighed by federal courts to determine whether the burden makes the statute unconstitutional. [Again citing *Southern Pacific.*]"

In appraising the effect which the statute had on interstate commerce, the Court stated (page 381):

"To appraise the weight of the burden of the Virginia statute on interstate commerce, related statutes of other states are important to show whether there are cumulative effects which may make local regulation impracticable."

In holding the Act unconstitutional, the Court further stated (page 386):

"As there is no federal act dealing with the separation of races in interstate transportation, we must decide the validity of this Virginia statute on the challenge that it interferes with commerce, as a matter of

balance between the exercise of the local police power and the need for national uniformity in the regulations for interstate travel."

Thus, the distinction between the two lines of cases does not arise, as defendants contend, from the fact that the Court, in *Barnwell* and *Hamilton*, was concerned with transportation by motor vehicle and in *Southern Pacific* with transportation by railroad. The distinction lies in the fact that in the two former cases the provisions under consideration related to matters of local concern while in the latter case the provision related to a matter of national concern. Defendants apparently recognize this distinction by arguing that the Act under attack is of local concern, on the basis that Illinois is a "wet-weather" state, having a large amount of wet, rainy and snowy weather, causing its roads to be wet and dirty for a substantial portion of each year. Defendants offered in evidence a report of the United States Weather Bureau showing the average annual precipitation at different points in the state. No similar proof, or proof of any kind, was offered as to the weather and highway conditions in other states. The mere fact that large amounts of rain and snow fall upon the highways of Illinois furnishes no support to the argument that the requirement as to splash guards is a matter of local concern in the absence of a showing that weather conditions affecting highways is different in other states, particularly those surrounding Illinois. We know, however, from experience common to all who travel the highways of this country that the situation under discussion is the same or similar in many states, and perhaps all. Particularly is that true in states surrounding Illinois and others of the midwest.

Defendants take no note of the burden which the Act places upon commerce, which perhaps is consistent with the theory that it relates to a matter of local concern and the burden, therefore, is immaterial. We reject the premise upon which this theory is predicated. The burden is material because enforcement directly relates to the national interest. That burden, in our judgment, will be tremendous. In fact, enforcement is likely to produce a demoralizing effect upon the operations conducted by plaintiffs, the intervenor and others similarly engaged. The certificate of public convenience and necessity issued to plaintiffs and other motor carriers by the Interstate Com-

merce Commission requires that they "shall render reasonably continuous and adequate service to the public in pursuance of the authority herein granted, and that failure to do so shall constitute sufficient grounds for suspension, change or revocation of this certificate." It is not discernible to us how plaintiffs can discharge their responsibilities under this certificate and at the same time comply with the requirements of the Illinois Act. It is hardly open to question but that compliance will result in intolerable delay in transportation and the expenditure of large sums of money for equipment and maintenance.

We are not impressed with defendants' argument that the Act should be sustained on the basis that the legislature acted within its police power and that the means of regulation chosen by it are reasonably adapted to the end sought. We assume that the contour splash guard will serve some beneficial purpose in eliminating splash. The same could be said for a piece of cardboard or other object hung behind the rear wheels of a trailer. As already shown, the conventional or straight mud flap previously recognized in Illinois and presently recognized by most and perhaps all of the other states served the purpose of preventing splash as well as does the contour guard. The result of the requirements of the Act is to place a great burden upon commerce, without any compensating benefit to the state. Under the circumstances, it cannot be held that the requirements of the Act are reasonably adapted to the end sought. In any event, a challenge that the Act interferes with commerce requires this Court to decide its validity "as a matter of balance between the exercise of the local police power and the need for national uniformity in the regulations for interstate travel." *Morgan* v. *Virginia*, 328 U. S. 373, 386. In our judgment, the burden which the Act casts upon commerce far outweighs any benefit derived by the state.

It is, therefore, our view and we so hold that the Act is unconstitutional and void, as violative of Article I, Section 8, of the Constitution of the United States, and that plaintiffs are entitled to a decree permanently enjoining its enforcement.

Indorsed

Filed Feb. 26, 1958.

G. W. Schwaner, Clerk.

APPENDIX II.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS
SOUTHERN DIVISION

Navajo Freight Lines, Inc., a New Mexico Corporation, et al. vs. Joseph D. Bibb, Director of the Department of Public Safety of the State of Illinois, et al.	Civil Action No. 2438 In Chancery

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

I. FINDINGS OF FACT.

1. That each of the plaintiffs operates in interstate commerce pursuant to certificates of public convenience and necessity issued by the Interstate Commerce Commission.

2. That pursuant to said certificates, each of the plaintiffs operates into and through the State of Illinois.

3. That intervener Arkansas-Best Freight System, Inc. operates in interstate commerce pursuant to a certificate of public convenience and necessity issued by the Interstate Commerce Commission.

4. That pursuant to said authority, Arkansas-Best Freight System, Inc. operates between points in Arkansas and Illinois, as well as between Arkansas and other States through Illinois.

5. That intervenor Arkansas-Best Freight System, Inc. also operates in intrastate commerce in the State of Arkansas, pursuant to authority granted by the Arkansas Public Service Commission, and is subject to the rules and regulations of said Commission.

6. That Section 121.02 of the Uniform Act Regulating Traffic on Highways, being Section 218b of Chapter 95½, Illinois Revised Statutes, as amended, by Act approved

July 8, 1957, requires that trailers of plaintiffs and intervener be equipped with a contour splash guard meeting certain described specifications and contouring the wheel within six (6) inches of the tire.

7. That compliance with said Act for vehicles used exclusively in interstate commerce by plaintiffs and intervener would cost each of them in excess of Three Thousand ($3,000.00) Dollars.

8. That on December 13, 1957 the Arkansas Public Service Commission issued an order requiring that all vehicles using Arkansas highways be equipped with the straight splash guard hanging perpendicular to the trailer and parallel to the rear axle.

9. That it is impossible for a splash guard to comply with the requirements of the Illinois Splash Guard Act and the order of the Arkansas Public Service Commission.

10. That a vehicle equipped with the splash guard required in Illinois cannot be operated legally in Arkansas, and a vehicle equipped with the splash guard required in Arkansas cannot be operated legally in Illinois.

11. That the splash guards permitted or required in 45 States are illegal in the State of Illinois by virtue of the Illinois Splash Guard Act.

12. That by virtue of the conflicting requirements of Illinois and Arkansas, the free flow of commerce by motor carriers is obstructed because equipment legal in one State is illegal in the other.

13. That each of the plaintiffs and intervener interchanges trailers with carriers throughout the United States in accordance with common and accepted practice of motor carriers in interstate commerce in order to provide through trailer service from origin to destination in compliance with the certificate of public convenience and necessity issued to them by the Interstate Commerce Commission.

14. That the trailers of each of the plaintiffs may reasonably be expected to traverse each of the 48 States by virtue of the interlining practices of plaintiffs and intervener with other carriers.

15. That the trailers of each of the plaintiffs traverse upon highways of the State of Arkansas.

16. That because trailers equipped in accordance with Illinois splash guard requirements cannot be operated legally in Arkansas, and trailers equipped in accordance with Arkansas splash guard requirements cannot be operated legally in Illinois, the interlining operations of plaintiffs will be obstructed.

17. That all carriers who operate into or through Illinois from any point in the United States will be required to equip their vehicles in accordance with the Illinois Splash Guard statute.

18. That all carriers whose equipment is sent into or through Illinois by virtue of interlining will be required to equip their vehicles in accordance with the Illinois Splash Guard statute.

19. That since it is impossible for a carrier operating in interstate commerce to determine which of its equipment will be used in a particular area, or on a particular day, or days, carriers operating into or through Illinois, or whose equipment may operate into Illinois through interlining will be required to equip all of their trailers in accordance with the requirements of the Illinois Splash Guard statute.

20. That because plaintiffs who operate into and through Illinois have no way of compelling carriers with whom they interline to equip their trailers in accordance with the Illinois splash guard statute, they will be forced to cease interlining trailers destined to or through Illinois with carriers who do not comply with Illinois law.

21. That it would be impossible in most cases, and impracticable in others, for plaintiffs to equip trailers obtained by interlining with the splash guard required by Illinois.

22. That the practice of interlining or interchanging trailers is an important means by which plaintiffs serve the shipping public in accordance with certificates of public convenience and necessity issued to them by the Interstate Commerce Commission, and is vital to the very existence of plaintiffs.

23. That the contour splash guard required by Section 121.02 of the Uniform Act Regulating Traffic on Highways, being Section 218h of Chapter 95½, Illinois Revised Statutes, as amended, by Act approved July 8, 1957, is not

intended to nor does it deal with a safety need or problem peculiar to the State of Illinois.

24. That the contour splash guard required in Illinois does not reduce the spray and splash caused by motor vehicles on highways any more effectively than the conventional or straight splash guard permitted in forty-five (45) States, if as well.

25. That because the contour splash guard is difficult to properly affix to the trailer, and because in its position it is peculiarly liable to receive many blows and be subject to vibration, it is particularly liable to come off while the vehicle is in operation, presenting a hazard to oncoming traffic, and creating a difficult and costly maintenance problem for carriers.

26. That since because of the Illinois Contour Splash Guard Act vehicles will be traveling with said guards in all forty-eight (48) States, the danger and safety hazards created by said guard will hinder and obstruct commerce on highways throughout the United States.

27. That because of the shrouding effect of the contour splash guard heat dissipation from air flow around the brake drum is reduced, creating brake fade from overheated brakes.

28. That brake fade increases the distance needed for a vehicle to stop, since the contour guard will be used throughout the United States, a new hazard will be added to highway travel in interstate commerce all over the United States.

29. That plaintiffs are seeking by this action to have the contour splash guard state of the State of Illinois declared invalid and unconstitutional as an undue and unreasonable burden and obstruction to the free flow of interstate commerce.

30. That said Illinois Contour Splash Guard Act, while placing a substantial burden and obstruction upon the free flow of interstate commerce, does not contribute to safety in Illinois, and in fact introduces new dangers and hazards to highway travel in Illinois and throughout the United States not hitherto in existence.

II. CONCLUSIONS OF LAW.

1. That the matter in controversy exceeds the sum of Three Thousand ($3,000.00) Dollars for each plaintiff and intervener, exclusive of interest and costs and arises under the Constitution and laws of the United States.

2. That this Court has jurisdiction of the parties and the subject matter of this action.

3. That enforcement of Section 121.02 of the Uniform Act Regulating Traffic on Highways, being Section 218b of Chapter 95½, Illinois Revised Statutes, as amended, by Act approved July 8, 1957 requiring that plaintiffs' and intervener's trailers be equipped with contour splash guards, and the Order of the Arkansas Public Service Commission issued December 13, 1957, requiring that plaintiffs' and intervener's trailers be equipped with the straight or conventional splash guards will render it impossible for plaintiffs and intervener to operate the same equipment in both States, thereby obstructing the free flow of commerce in direct violation of the Commerce Clause, Article I, Section 8 of the United States Constitution, and said Illinois Act is, therefore, unconstitutional and invalid.

4. That Section 121.02 of the Uniform Act Regulating Traffic on Highways, being Section 218b of Chapter 95½, Illinois Revised Statutes, as amended, by Act approved July 8, 1957, unduly and unreasonably burdens and obstructs the free flow of commerce between the States by making splash guards which are legal in forty-five (45) States illegal in Illinois, and is, therefore, unconstitutional and invalid as a direct violation of the Commerce Clause, Article I, Section 8 of the United States Constitution.

5. That plaintiffs and intervener are entitled to a permanent injunction enjoining and restraining the defendants, and each of them, their successors in office and their agents, attorneys and employes, and each and every one of them, from enforcing or instituting proceedings to enforce Section 121.02 of the Uniform Act Regulating Traffic on Highways, being Section 218b of Chapter 95½, Illinois Revised Statutes, as amended, by Act approved July 8, 1957 by reason of the fact that said Act is an unreasonable and undue burden and obstruction to the free flow of interstate

commerce in violation of the Commerce Clause, Article I, Section 8 of the United States Constitution.

ENTER:

/s/ J. EARL MAJOR
/s/ CHAS. G. BRIGGLE
/s/ FREDERICK O. MERCER

Dated: Feb. 26, 1958.
Indorsed Filed
Feb. 26, 1958
G. W. Schwaner, Clerk

APPENDIX III.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS
SOUTHERN DIVISION

Navajo Freight Lines, Inc.,
a New Mexico corporation,
Ringsby Truck Lines, Inc.
a Nebraska corporation,
Prucka Transportation, Inc.,
a Nebraska corporation,
Denver Chicago Trucking Co., Inc.,
a Nebraska corporation, and
Pacific Intermountain Express Co.,
a Nevada corporation,
Plaintiffs,

and

Arkansas-Best Freight System, Inc.,
An Arkansas corporation,
Intervenor,

vs.

Joseph D. Bibb, Director of the Department of Public Safety of the State of Illinois

and

William H. Morris, Superintendent of the Division of State Highway Police, Department of Public Safety of the State of Illinois,
Defendants.

Civil Action
No. 2438
For Declaratory
Judgment
and Injunctive
Relief

ORDER.

This cause coming on to be heard on the complaint of plaintiffs, Navajo Freight Lines, Inc., Ringsby Truck Lines, Inc., Prucka Transportation, Inc., Denver Chicago Trucking Co., Inc., Watson Bros. Transportation Co., Inc. and Pacific Intermountain Express Co., and the intervening petition and complaint of intervenor, Arkansas-Best Freight System, Inc., for a declaratory judgment that Section 121.02 of the Uniform Act Regulating Traffic on High-

ways, being Sec. 218b of Chap 95½ (Ill. Rev. Stat.), as amended by Act approved July 8, 1957, is unconstitutional and void and for a permanent injunction enjoining defendants from enforcing or instituting proceedings against plaintiffs under the said Act, the Court having jurisdiction of the parties and the subject matter, being fully advised in the premises having heard the evidence and the arguments of all the parties hereto in open court, having considered the briefs submitted by the parties, and having filed its findings of fact, conclusions of law and opinion on February 26, 1958 holding Section 121.02 of the Uniform Act Regulating Traffic on Highways, being Section 228b of Chapter 95½, Illinois Revised Statutes, as amended by Act approved July 8, 1957 to be unconstitutional and void, as violative of Article I, Section 8, of the Constitution of the United States.

It Is Hereby Ordered, Adjudged And Decreed that the defendants, Joseph D. Bibb, Director of the Department of Public Safety of the State of Illinois, and William H. Morris, Superintendent of the Division of State Highway Police, Department of Public Safety of the State of Illinois, and each of them, their successors in office and their agents, servants, attorneys and employees be and they are hereby permanently restrained and enjoined from enforcing or instituting any proceedings of any kind or nature whatsoever against the plaintiffs or intervenor herein for violations of Section 121.02 of the Uniform Act Regulating Traffic on Highways, being Section 218b of Chapter 95½, Illinois Revised Statutes, as amended, by Act approved July 8, 1957.

Enter:

/s/ Chas. G. Briggle

/s/ Frederick O. Mercer

Dated: March 10th, 1958

Indorsed Filed

Mar. 19, 1958

G. W. Schwaner, Clerk

CERTIFICATE OF SERVICE.

I, William C. Wines, one of counsel for appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on or before the 9th day of June, 1958, I served copies of the foregoing Jurisdictional Statement on Appellees, as follows:

By mailing of five copies of said Jurisdictional Statement to

Axelrod, Goodman and Steiner
39 South La Salle Street
Suite 703
Chicago 3, Illinois

Arnold Lloyd Burke
100 W. Monroe Street
Suite 1410
Chicago 3, Illinois

Stephenson and Routman
208 W. Adams Street
Springfield, Illinois

Harper, Harper and Young
Kelly Building
Ft. Smith, Arkansas

in duly addressed envelopes, postage prepaid.

WILLIAM C. WINES
One of Counsel for Appellants.



LIBRARY
SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 91

JOSEPH D. BIBB, Director of the Department of Public Safety of the State of Illinois, and **WILLIAM H. MORRIS**, Superintendent of the Division of State Highway Police, Department of Public Safety of the State of Illinois,

Appellants,

vs.

NAVAJO FREIGHT LINES, INC., a New Mexico corporation, **RINGSBY TRUCK LINES, INC.**, a Nebraska corporation, **PRUCKA TRANSPORTATION, INC.**, a Nebraska corporation, **DENVER CHICAGO TRUCKING CO., INC.**, a Nebraska corporation, **WATSON BROS. TRANSPORTATION CO., INC.**, a Nebraska corporation, **PACIFIC INTERMOUNTAIN EXPRESS CO.**, a Nevada corporation, and **ARKANSAS-BEST FREIGHT SYSTEM, INC.**, an Arkansas corporation,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS, SOUTHERN DIVISION

MOTION TO AFFIRM.

DAVID AXELROD,
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CARL L. STEINER,
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MACK STEPHENSON,
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Springfield, Illinois,

INDEX.

	PAGE
Statement	2
Argument	4
Conclusion	16
Certificate of Service	18

Cases and Statutes Cited.

Castle v. Hayes Freight Lines, 348 U. S. 61	15
Constitution of the United States, Art. I, Sec. 8	4
Gibbons v. Ogden, 9 Wheat (U. S.) 1, 6 L. Ed. 23	4
Idaho Code 1957, Title 49, Sec. 840	6
Illinois Uniform Act Regulating Traffic on Highways, (Ill. Rev. Stats. 1957, Ch. 95½, Sec. 218(b))	2 *passim* 18
Judicial Code, 28 U. S. C.	
Sec. 1253	2
Sec. 2284	2
Kelly v. State of Washington, ex rel. Foss & Co., 302 U. S. 1	9, 12
Maurer v. Hamilton, 309 U. S. 598	14
Morgan v. Commonwealth of Virginia, 328 U. S. 373	11, 12
Oregon Revised Statutes, 1955	
Sec. 483.458	6
Revised Rules of the Supreme Court of the United States, Rule 16	2
South Carolina Highway Dept. of Barnwell Bros., 303 U. S. 177	12, 13, 14
Southern Pacific Co. v. Arizona, 325 U. S. 761	4, 10, 11, 16
Sproles v. Binford, 286 U. S. 374	14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. .....

JOSEPH D. BIBB, Director of the Department of Public Safety of the State of Illinois, and WILLIAM H. MORRIS, Superintendent of the Division of State Highway Police, Department of Public Safety of the State of Illinois,

Appellants,

vs.

NAVAJO FREIGHT LINES, INC., a New Mexico corporation, RINGSBY TRUCK LINES, INC., a Nebraska corporation, PRUCKA TRANSPORTATION, INC., a Nebraska corporation, DENVER CHICAGO TRUCKING CO., INC., a Nebraska corporation, WATSON BROS. TRANSPORTATION CO., INC., a Nebraska corporation, PACIFIC INTERMOUNTAIN EXPRESS CO., a Nevada corporation, and ARKANSAS-BEST FREIGHT SYSTEM, INC., an Arkansas corporation,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS, SOUTHERN DIVISION.

MOTION TO AFFIRM.

Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that the final judgment and Decree of the District Court be affirmed on the ground that the question is so unsubstantial as not to warrant further argument.

STATEMENT.

This is a direct appeal pursuant to 28 U. S. C. A. Section 1253 from the final judgment and decree entered on March 19, 1958, by a District Court of three judges specially constituted pursuant to 28 U. S. C. A. Section 2284, holding Sec. 121.02 of the Uniform Act Regulating Traffic on Highways, being Section 218b of Chap. 95½, as amended (Ill. Rev. Stat.), approved July 8, 1957, to be unconstitutional and void, and permanently enjoining the defendants from enforcing or instituting proceedings against plaintiffs under the Act. The opinion of the District Court is officially reported at 159 F. Supp. 385.

Section 121.02 of the Uniform Act Regulating Traffic on Highways, being Section 218b of Chap. 95½, as amended (Ill. Rev. Stat.), approved July 8, 1957 (hereinafter referred to as the "Act") requires a "contour splash guard" behind the rear wheels of certain vehicles before they may be operated upon the highways of the State of Illinois. The Act became effective as to newly purchased vehicles on August 1, 1957 and as to all vehicles on January 1, 1958 (J. St. 4). On December 2, 1957, plaintiffs, Navajo Freight Lines, Inc., Ringsby Truck Lines, Inc., Prucka Transportation, Inc., Denver Chicago Trucking Co., Inc., Watson Bros. Transportation Co., Inc. and Pacific Intermountain Express Co. filed the instant action to have the Act declared unconstitutional and void and for an injunction restraining defendants from enforcing or instituting proceedings against them under the Act.

On December 18, 1957, Arkansas-Best Freight System, Inc. intervened in support of plaintiffs. On January 15 and 16, 1958 the District Court heard testimony and argu-

ment presented by the respective parties, after which the matter was taken under advisement. At the request of the District Court, briefs were submitted by all of the parties. On February 26, 1958 the Court handed down its opinion, conclusions of law and findings of fact. The final order was entered March 19, 1958.

ARGUMENT.

The District Court's decision is plainly correct. This Court has considered the issue presented by this litigation on numerous occasions, since its first pronouncement in *Gibbons* v. *Ogden,* 9 Wheat (U. S.) 1, 6 L. Ed. 23. Each time it has affirmed the principles set out in that case. Simply stated, the only issue presented by this appeal is whether or not a Federal Court has the power, indeed the duty, under Article I, Sec. 8 of the Constitution of the United States, to protect the free flow of commerce by holding unconstitutional a state statute which clearly places a substantial burden and obstruction upon the free flow of interstate commerce with absolutely no compensating local benefits.

Appellees submit that this Court's statement in *Southern Pacific Co.* v. *Arizona,* 325 U. S. 761, is controlling here. There being no factual issue raised, the following statement in that case was correctly followed by the District Court (325 U. S., at page 767):

> "But ever since *Gibbons* v. *Ogden,* 9 Wheat. (U. S.) 1, 6 L. Ed. 23, the states have not been deemed to have authority to impede substantially the free flow of commerce from state to state, or to regulate those phases of national commerce, which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority."

After hearing almost two days of testimony presented by the parties, the District Court, both in its opinion and findings of fact, made very comprehensive findings covering the entire subject matter. Its key and decisive finding was "That said Illinois Contour Splash Guard Act, while placing a substantial burden and obstruction upon the free

flow of interstate commerce, does not contribute to safety in Illinois, and, in fact, introduces new dangers and hazards to highway travel in Illinois and throughout the United States not hitherto in existence." (Finding of Fact No. 30). Furthermore, in its opinion the District Court stated (159 F. Supp. at 388-389, J. Stat. at Appendix 6-7):

> "It was also conclusively shown that the contour mud flap possesses no advantages over the conventional or straight mud flap previously required in Illinois and presently required in most of the states. Counsel for defendants in oral argument substantially so conceded, as evidenced by the following statement 'There was a wealth of testimony to the effect that in their opinion the old styles were better and were preferable and were cheaper and were longer lived, but nobody said that it bore no relation, no reasonable relation to the end sought.' In connection with this admission it should be noted that counsel consistently throughout the hearing took the position that such comparison was irrelevant, objected to the admission of such testimony, and for the same reason, we assume, offered no testimony on this point in rebuttal."

Perhaps belatedly regretting this uncompromising position taken by counsel for the state at the trial, the appellants in their jurisdictional statement now seek to escape the force of the trial court's findings by mentioning some isolated bits of evidence "not summarized in the Court's opinion or reflected in its findings of fact." Thus, the appellants state that "a plastic contour splash guard when backed into an object * * * snaps back into position and is not damaged. Even when a plastic contour splash guard was subjected to ten times the vibration that you would get on the wood, it was not damaged." (J. Stat. p. 9.) However, the District Court specifically found "That because the contour splash guard is difficult to properly affix to the trailer, and because in its position it is peculiarly liable

to receive many blows and be subject to vibration, it is particularly liable to come off while the vehicle is in operation, presenting a hazard to oncoming traffic, and creating a difficult and costly maintenance problem for carriers." (Findings of Fact No. 25.) This finding reflects an elaborate demonstration in the record establishing the difficulties encountered in keeping the contour splash guard in position.

Appellants also assert that "a contour splash guard unlike a 'flat' or 'apron' type mud guard will throw debris down instead of straight out and that when one follows a vehicle with 'inadequate' splash guards, water is thrown on the windshield and he is forced off the paved area with the result that many accidents are caused." (J. Stat. p. 9.) But the District Court specifically found "That the contour splash guard required in Illinois does not reduce the spray and splash caused by motor vehicles on highways any more effectively than the conventional or straight splash guard permitted in forty-five (45) states, if as well."[1] (Finding of Fact No. 24.) Here again the Court's finding accurately reflects an overwhelming factual demon-

1. The District Court stated: "We were led to believe at the time of the hearing, and still believe, that all of the states, except Illinois and perhaps Oregon and Idaho, require nothing more than the conventional or straight mud flap, none of which would comply with the Illinois Act." (J. Stat. at Appendix pp. 5-6.) It is the requirement of the Illinois Act that the splash guard "contour" the wheel in a certain prescribed way that makes the Illinois statutory requirement different than that of any other state. The statutes of all other states—even those using the word fender—may be satisfied by the so-called straight or conventional splash guard. The straight or conventional splash guard is presently in use in both Idaho and Oregon. (Transcript of Proceedings 108-109.) A mere reading of the Idaho (Title 49, Sec. 840 Idaho Code 1957) and Oregon (Sec. 483.458 Oregon Revised Statute 1955) statutes demonstrates that a straight splash guard will satisfy their requirements, since the bottom of the trailer itself forms the cover over the wheel and neither Oregon nor Idaho specify that the required splash guard *contour* the wheel a certain distance from the tire.

stration that the contour splash guard contributes nothing to safety in operations that is not equally accomplished by conventonal splash guards.

Although the cost of installing contour splash guards is not determinative to the holding herein, again the appellants have misstated the facts by asserting that "[t]hey can be installed for about $10 a set." (J. Stat. 9.) The Court found (159 F. Supp. at page 387, J. Stat. at Appendix, page 4): "Each of the plaintiffs in order to operate in Illinois, will be required to equip its trailers with the contour type splash guard required by the Illinois Act, the cost of which is $30 or more per vehicle." The Court also noted that "expense incident to maintenance and replacement is heavy."

Appellants also assert that "A captain of the Illinois State Highway Police testified that no accidents had been caused by contour splash guards." (J. Stat. page 10.) This is apparently a feeble effort to contradict the court's findings with regard to the road hazards introduced by the Act. To be strictly accurate, the captain testified that he did not know of any accidents in Illinois caused by contour splash guards. Significantly, the same captain admitted that he did not know of any accidents caused by splash or spray during the same period, although most vehicles were operating with the straight splash guards rather than the contour guards. (Transcript of Proceedings, 258.)

Although the appellants seek to deal with the obstruction of commerce between Illinois and Arkansas created by the Act with "only a word" (J. Stat. 14), the problem presented is a major one. The District Court did not find that "it is possible to change mudguards in interstate transit", as might be inferred by reading the Jurisdictional Statement. (J. Stat. 14.) On the contrary it specifically found "That it would be impossible in most cases, and impracticable in others, for plaintiffs to equip trailers obtained by inter-

lining with the splash guard required by Illinois". (Findings of Fact No. 21) and it further found "That by virtue of the conflicting requirements of Illinois and Arkansas, the free flow of commerce by motor carriers is obstructed because equipment legal in one state is illegal in the other" (Findings of Fact No. 12; see also Nos. 9, 10 and 16.) These findings are based upon an abundance of evidence contained in the record.

Thus, the comprehensive Findings of Fact made by the District Court establish conclusively that the contour splash guard required by the Act places a very substantial and undue burden and obstruction upon interstate commerce while contributing nothing new to safety on Illinois highways. In fact, the Court specifically found that certain new hazards are created by the contour splash guard which are not caused by conventional splash guards.

The clear and conclusive findings of the District Court place the issue of law in clear focus. Upon such a record, what is the duty of the Federal Courts, under the Constitution, with regard to the protection of the free flow of interstate commerce?

Appellants throughout this proceeding have maintained that the police power of the State of Illinois permits the state to pass any law reasonably adapted to its stated objective, without concerning itself with the obstruction to or burden upon interstate commerce. Their position has been that if the contour splash guard required by the statute, considered by itself, contributes something towards minimizing spray and thus enhancing safety, the requirement is justified, even though other equipment more generally in use accomplishes the same purpose just as effectively without any of the accompanying hazards and burdens caused by the contour guards. In the Jurisdictional Statement the same proposition is stated as follows (at pages 13-14):

"[a] State may adopt reasonable regulations as to the

equipment to be used on its highways and such regulations may extend to vehicles traveling in interstate as well as intrastate commerce."

Appellants do not seem to regard the fact that the Act unduly burdens and even obstructs interstate commerce as important. The District Court also commented upon this refusal of appellants to take cognizance of the commerce question (159 F. Supp. at page 394; J. Stat. Appendix pages 15-16):

> "Defendants take no note of the burden which the Act places upon commerce, which perhaps is consistent with the theory that it relates to a matter of local concern, and the burden, therefore, is immaterial. We reject the premise upon which this theory is predicated. The burden is material because enforcement directly relates to the national interest. That burden, in our judgment, will be tremendous. In fact, enforcement is likely to produce a demoralizing effect upon the operations conducted by plaintiffs, the intervenor, and others similarly engaged."

The function, indeed the duty, of a federal court when a state statute is attacked as an undue burden and obstruction upon interstate commerce, has already been clearly enunciated. In *Kelly v. State of Washington ex rel., Foss & Co.*, 302 U. S. 1, 15, this Court said:

> "We have found that in relation to the inspection of the hull and machinery of these tugs, in order to insure safety and seaworthiness, there is a field in which the state law could operate without coming into conflict with present Federal laws. Is that a subject which necessarily and in all aspects requires uniformity of regulation and as to which the State cannot act at all, although Congress has not acted? We hold that it is not. A vessel which is actually unsafe and unseaworthy in the primary and commonly understood sense is not within the protection of that principle. The State may treat it as it may treat a diseased animal

or unwholesome food. In such a matter, the State may protect its people without waiting for Federal action providing the state action does not come into conflict with Federal rules. *If, however, the State goes further and attempts to impose particular standards as to structure, design, equipment and operation which in the judgment of its authorities may be desirable but pass beyond what is plainly essential to safety and seaworthiness, the State will encounter the principle that such requirements, if imposed at all, must be through the action of Congress which can establish a uniform rule. Whether the State in a particular matter goes too far must be left to be determined when the precise question arises.*" (Italics supplied.)

Similarly, in *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761, at 770-771 and 781-782, this Court stated:

"* * * [T] he matters for ultimate determination here are the nature and extent of the burden which the state regulation of interstate trains adopted as a safety measure, imposes on interstate commerce, and whether the relative weights of the state and national interests involved are such as to make inapplicable the rule generally observed, that the free flow of interstate commerce and its freedom from local restraints in matters requiring uniformity of regulation are interests safeguarded by the commerce clause from state interference.

* * * * * * *

"Here we conclude that the state does go too far. Its regulation of train lengths, admittedly obstructive to interstate train operation, and having a seriously adverse effect on transportation efficiency and economy, passes beyond what is plainly essential for safety since it does not appear that it will lessen rather than increase the danger of accident. Its attempted regulation of the operation of interstate trains cannot establish nation-wide control such as is essential to the maintenance of an efficient transportation system, which Congress alone can prescribe. The state interest cannot be preserved at the expense of the national interest

by an enactment which regulates interstate train lengths without securing such control, which is a matter of national concern. To this the interest of the state here asserted is subordinate."

Finally, this Court, in *Morgan v. Commonwealth of Virginia*, 328 U. S. 373, a motor carrier case, very recently had occasion to reaffirm its holding in the *Southern Pacific* case, and to make clear that the same basic principle applies as much to motor carriers as to rail and water carriers. There, this Court succinctly summarized the effects of the previous cases in the transportation area as follows:

"In the field of transportation, there has been a series of decisions which hold that where Congress has not acted and although the state statute affects interstate commerce, a state may validly enact legislation which has predominantly only a local influence on the course of commerce. [Citing *inter alia*, *South Carolina v. Barnwell Bros.*, 303 U. S. 177, and *Maurer v. Hamilton*, 309 U. S. 598.] It is equally well settled that, even where Congress has not acted, state legislation or a final court order is invalid which materially affects interstate commerce. [Citing *Southern Pacific*.] Because the Constitution puts the ultimate power to regulate commerce in Congress, rather than the states, the degree of state legislation's interference with that commerce may be weighed by Federal Courts to determine whether the burden makes the statute unconstitutional. [Again citing *Southern Pacific*.]" (328 U. S. at 378-379.)

This Court has, therefore, by a series of cases clearly outlined the responsibility of a federal court to protect the free flow of commerce between the states. This Court has also made it clear that this obligation applies to all types of commerce, and more particularly to all types of transportation. Appellants' question "Is the Act within the police power of the State of Illinois reserved to the states

under the provisions of the Tenth Amendment to the Constitution of the United States?" (J. Stat. 7) has already been answered by the *Morgan* case. The Court stated that the Constitution places the ultimate power to regulate commerce in Congress, and therefore "[T]he degree of state legislation's interference with that commerce may be weighed by federal courts to determine whether the burden makes the statute unconstitutional." (328 U. S. at page 378.)

The appellants apparently undertake to carve out a special area where these established principles have no application—namely, any state regulation purporting to deal with the safety of motor vehicle operations. A moment's consideration of the breadth of this proposition will demonstrate its inherent unsoundness. It would leave each state entirely free to prescribe the exact type of motor vehicle equipment favored by that particular state, even though numerous other types in actual operation in interstate commerce were equally suitable from the standpoint of safety and perhaps more desirable from the standpoint of efficiency. Thus, interstate commerce by motor carrier would become virtually impossible unless all states could agree on a single type of equipment, or the federal government stepped in to provide a single uniform rule. This is exactly the result which Chief Justice Hughes foresaw and warned against in *Kelly* v. *State of Washington, ex rel., Foss & Co., supra.*

Close examination of the cases relied upon by the appellants will also establish the unsoundness of their position. For example, they would interpret the *Barnwell* case as a complete abdication of the responsibility of the federal courts to protect interstate commerce from undue burdens imposed by the states, so long as the commerce involved proceeds by motor carrier rather than by rail, water or air. Careful reading discloses that Mr. Justice Stone did not

intend any such unique and discriminatory withdrawal of federal protection from interstate commerce by motor carrier. His opinion emphasizes throughout the special relationship between the size and weight of motor vehicles and the construction and upkeep of the roads themselves, which is so largely a state function. There is no such special relationship between the construction and upkeep of the highways and the exact type of splash guard which should be used by vehicles using the highways. Furthermore, even with regard to the particular type of regulation involved in the *Barnwell* case, Mr. Justice Stone did not foreclose judicial scrutiny of the reasonableness of the legislation and its bona fide connection with the preservation and use of the highways. Thus, even where there is some special relationship between the needs of the state and the legislation, he indicated only that the legislative judgment was entitled to the presumption of validity and that this presumption could be upset by showing that facts judicially known or established in the record demonstrated the unreasonableness of the legislative judgment. As Mr. Justice Stone's opinion also indicates, the record in the *Barnwell* case itself provided "adequate support" for the legislative judgment. (303 U. S. at 195.) Included in that record was the report of a special commission appointed to investigate motor transportation in the state and the report of the state engineer who had constructed the concrete highways of the state indicating the need for size and weight limitations at least as rigorous as those prescribed. Needless to say, there is no comparable objective and disinterested evidence in the record of this case, or in the history of this legislation, indicating the need for, or appropriateness of, contour splash guards, either to preserve the highways of Illinois, or to enhance the safety of their use. On the contrary, the Dis-

trict Court specifically found that the Act did not contribute to safety, and in fact introduced new hazards to highway travel throughout the United States.

In the *Maurer* case, upon which the Attorney General also relies, it is equally clear that Mr. Justice Stone did not intend that the federal courts abdicate their duty to protect the free flow of interstate commerce from undue burdens and obstructions pursuant to the commerce clause of the Constitution. In *Maurer*, as in *Barnwell*, considerable affirmative evidence was introduced to show Pennsylvania's need for the statute under attack:

> "* * * [t]here was extensive evidence tending to show that the transportation by appellants over the state highways of cars placed above the cab of the transporting vehicle is unsafe to the driver and to the public, the trial court found that the location of motor vehicles over the cab of the carrier rendered its operation dangerous on the curves and grades of the Pennsylvania highways." (309 U. S., at 600-601.)

Mr. Justice Stone further summarized additional findings of fact in the *Maurer* case (309 U. S. at 601) before concluding that in that case there was no undue burden on commerce.

So too in *Sproles* v. *Binford*, 286 U. S. 374, the Supreme Court gave considerable attention to the comprehensive findings of the District Court establishing "according to the special requirements of local conditions" (286 U. S. at 390) the need for, and the reasonableness of, the particular size and weight limitations involved, before concluding as a matter of law that there was no undue burden upon interstate commerce.

The twenty years which have elapsed since the decision

in the *Barnwell* case have demonstrated the increasing national interest in interstate commerce by motor carrier which makes unthinkable the sweeping abdication of federal authority which appellants have attempted to read into that decision. The Supreme Court's appreciation of this national interest is demonstrated by its recent decision in *Castle* v. *Hayes Freight Lines*, 348 U. S. 61, holding invalid another purported Illinois safety regulation when applied to interstate trucking on the ground of conflict with the policies and objectives of the Interstate Commerce Act. It is also noteworthy that the national interests protected in the *Hayes Freight Lines* case were exactly the same as those which are seriously threatened by the present Illinois law, namely, interstate motor carrier operations which are carried on under certificates of convenience and necessity issued by the Interstate Commerce Commission. It is true, of course, that the Commission could go further under the Interstate Commerce Act and prescribe the exact type of equipment required for the prevention of splash by motor carriers, just as the Commission could, and, in fact, eventually did prescribe the governing rule with respect to the length of trains operating in interstate commerce. However, the Commission has been understandably reluctant to prescribe the exact type of equipment to be used by interstate motor carriers so long as there are no pressing safety considerations demanding a particular type and so long as existing state requirements do not seriously burden the efficient operation of interstate commerce.

Clearly, the situation presented here is no different than that typically presented to a federal court when it is called upon to determine whether a particular state enactment creates an undue burden upon or actually obstructs interstate commerce. In such a situation, the Court could always

avoid its own responsibilities by adopting appellants' view and holding that if the burden and obstruction should get serious enough Congress could step in and provide a uniform rule. However, as Mr. Justice Stone so aptly said in the *Southern Pacific* case,

> "For a hundred years it has been accepted constitutional doctrine that the commerce clause, without the aid of Congressional legislation, thus affords some protection from state legislation inimical to the national commerce."

There being no rule of the Interstate Commerce Commission with respect to the exact type of splash guards which must be used, it is the clear duty of the federal courts to do as the District Court has done in this case—determine whether a particular state requirement is so unwarranted by legitimate safety considerations and so inimical to national commerce as to require a determination of invalidity.

CONCLUSION.

The District Court's unanimous and undisputed finding of fact that Illinois' exclusive requirement of the "contour splash guard", as specifically described in the statute, makes no unique contribution to the safety of highway operations, coupled with the further unanimous finding, amply supported by more specific findings, that it places a "tremendous" burden upon and direct obstruction to interstate commerce by motor carrier, is decisive of this entire controversy. Under such circumstances, this Court has already ruled on numerous occasions that it is the obligation of the federal courts to hold such a statute invalid as an undue burden upon interstate commerce. The

District Court's judgment and decree should therefore be affirmed without further argument.

Respectfully submitted,

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CERTIFICATE OF SERVICE.

I, David Axelrod, one of counsel for appellees herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on or before the 9th day of July, 1958, I served copies of the foregoing Motion to Affirm on Appellants, as follows:

By mailing five copies of said Motion to Affirm to

Latham Castle,
Attorney General of the State of Illinois,
160 North LaSalle Street, Suite 900,
Chicago (1), Illinois

in a duly addressed envelope, postage prepaid.

DAVID AXELROD,
One of the Counsel for Appellants.

3

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1957

No. 1060

JOSEPH D. BIBB, Director of the Department of Public Safety of the State of Illinois, *et al.*,

Appellants,

vs.

NAVAJO FREIGHT LINES, INC., a New Mexico corporation, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS, SOUTHERN DISTRICT.

APPELLANTS' BRIEF IN OPPOSITION TO APPELLEES' MOTION TO AFFIRM (CERTIFICATE OF SERVICE).

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IN THE

Supreme Court of the United States

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JOSEPH D. BIBB, Director of the Department of Public Safety of the State of Illinois, *et al.*,

Appellants,

vs.

NAVAJO FREIGHT LINES, INC., a New Mexico corporation, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS, SOUTHERN DISTRICT.

APPELLANTS' BRIEF IN OPPOSITION TO APPELLEES' MOTION TO AFFIRM.

I.

Appellees' motion to affirm does not overcome appellants' demonstration that the act involved does not unconstitutionally burden interstate commerce and is within the police power of the State.

The appellees' motion to affirm begs rather than states "the only issue presented by this appeal" in the following language at page 4 of that motion:

"Simply stated, the only issue presented by this appeal is whether or not a Federal Court has the power, indeed the duty, under Article I, Sec. 8 of the Constitution of the United States, to protect the free flow of commerce by holding unconstitutional a state statute which clearly places a substantial burden and obstruction upon the free flow of interstate commerce with absolutely no compensating local benefits."

The requirements of the statute (Ill. Rev. Stat. 1957, Ch. 95½, Par. 218 (b) Vol. II, p. 724) reprinted in full in Appellants' Jurisdictional Statement does not place "a substantial burden and obstruction upon the free flow of interstate commerce with absolutely no compensating local benefits."

The evidence summarized in the Jurisdictional Statement is that a contour splash guard, unlike a "flat" or "apron" type mud guard, will throw debris down instead of straight out (Rec. 322). When one is driving behind a unit that has inadequate splash guards, mud and water is thrown all over the windshield of a following vehicle with momentary loss of vision. When one loses vision he drops the left side of his car off the paved area of the road and many accidents are caused by trying to right the car from such rolling (Rec. 325).

The evidence is uncontradicted that contour splash guards prevent mud and water from splashing upon and obstructing stop and flicker lights and license plates (Rec. 340).

Appellees' Motion to Affirm does not avoid the teachings of *South Carolina Highway Department* v. *Barnwell Bros., Inc.*, 303 U. S. 161, *Maurer* v. *Hamilton*, 309 U. S. 598, *Sproles* v. *Binford*, 286 U. S. 374, and other pertinent authorities in their incisive application to the instant case.

All of these cases are discussed in Appellants' Jurisdictional Statement at pages 10 through 13.

The Act stricken down by the district court in this case is a reasonable exercise of the State's police power, as is demonstrated in Appellants' Jurisdictional Statement, and is therefore proof against appellees' attacks upon it.

It not being the office of a brief in reply to a motion to affirm to canvass the case at large, we restrict this reply brief to the considerations developed above.

Respectfully submitted,

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CERTIFICATE OF SERVICE.

I, William C. Wines, one of counsel for appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on or before the 16th day of July, 1958, I served copies of the foregoing Appellants' Brief in opposition to Appellees' Motion to affirm as follows:

By mailing of five copies of said Jurisdictional Statement to

Axelrod, Goodman and Steiner,
39 South La Salle Street
Suite 703
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Ft. Smith, Arkansas.

Stephenson and Routman,
208 W. Adams Street,
Springfield, Illinois.

in duly addressed envelopes, postage prepaid.

WILLIAM C. WINES,
One of Counsel for Appellants.

4

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1957.

No. 1060 94

JOSEPH D. LOHR, Director of the Department of Public Safety of the State of Illinois, *et al.*,

Appellants,

vs.

NAVAJO FREIGHT LINES, INC., a New Mexico corporation, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS, SOUTHERN DIVISION.

BRIEF OF APPELLANTS PRESENTING LATE AUTHORITY UNDER THIS COURT'S RULE 41, PAR. 5

CERTIFICATE OF SERVICE

APPENDIX

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WILLIAM C. WINES,
RAYMOND S. SARNOW,

INDEX.

	PAGE
Brief of Appellants presenting late authority under this Court's Rule 41, Par. 5	1
Argument:	
I Rudolph Express Company v. Bibb, not yet reported, reprinted in full, Appendix I of this brief, read in the light of People v. Warren, 11 Ill. 2d 420, properly sustained the reasonableness of the Illinois Mudguard Act of 1957	2
II There is a direct conflict of authority between the district court's decision in the instant case and the decision of the Supreme Court of Illinois in the Rudolph Express Company case, which adheres to the Warren case	5
Conclusion	5

Table of Cases and Authorities Cited.

Navajo Freight Lines v. Bibb, 159 F. Supp. 385	2
People v. Warren, 11 Ill. 2d 420	1, 2, 3
Rudolph Express Co. v. Bibb, not yet reported, Appendix I, Docket No. 34819—Ill. Supreme Court	1, 2
Ill. Rev. Stats. 1955, Ch. 95½, Par. 218 (b), Vol. 2, p. 266	3
Ill. Rev. Stat. 1957, Ch. 95½, Par. 218 (b), Vol. 2, p. 724	1

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1957.

No. 1060

JOSEPH D. BIBB, Director of the Department of Public Safety of the State of Illinois, *et al.*,

Appellants,

vs.

NAVAJO FREIGHT LINES, INC., a New Mexico corporation, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS, SOUTHERN DIVISION.

BRIEF OF APPELLANTS PRESENTING LATE AUTHORITY UNDER THIS COURT'S RULE 41, PAR. 5.

On September 18, 1958, the Supreme Court of Illinois decided *Rudolph Express Co.* v. *Bibb*, not yet reported, that Court's Docket No. 34819, opinion reprinted in full, Appendix 1. The court unanimously sustained as reasonable and constitutional the Illinois Mudguard Act, as amended in 1957 (Ill. Rev. Stats. 1957, Ch. 95½, Par. 218 (b), Vol. II, p. 724, reprinted in full, *Appellants' Jurisdictional Statement*, pp. 3-6), which is the Act held invalid by the district court in this case.

The pertinency of that opinion in the light of *People* v. *Warren*, 11 Ill. 2d 420, which sustained the Act in its 1955

form, is suggested in this supplemental brief and it is demonstrated that there is a direct conflict of authorities as to the constitutionality of the 1957 Act arising from the contrariety of decision between the district court's decision in the instant case, on the one hand, and the *Rudolph Express Company* case and the *Warren* case on the other hand.

I.

RUDOLPH EXPRESS COMPANY V. BIBB, NOT YET REPORTED, REPRINTED IN FULL, APPENDIX I OF THIS BRIEF, READ IN THE LIGHT OF PEOPLE v. WARREN, 11 ILL. 2d 420, PROPERLY SUSTAINED THE REASONABLENESS AND CONSTITUTIONALITY OF THE ILLINOIS MUDGUARD ACT OF 1957.

In *Rudolph Express Company* v. *Bibb*, not yet reported, reprinted in full, Appendix I to this brief, the Supreme Court of Illinois had before it an attack upon the reasonableness of the classifications of vehicles that were subjected to and the vehicles that were exempted from the Act.

In *People* v. *Warren*, 11 Ill. 2d 420, the court had sustained the 1955 version of the Act.

In the *Rudolph Express Company* case the court, taking cognizance of but declining to follow the court in *Navajo Freight Lines, Inc.* v. *Bibb*, 159 F. Supp. 385, said:

> "It is true that some of the enumerated vehicles fall readily into two categories suggested by the defendants; (1) the vehicle makes only occasional use of State highways and it would be impractical to require a permanent splash guard of the kind specified when no guards at all are required on the vehicle during most of its use, and (2) the normal operation of the vehicle would cause repeated damage to the specified splash guard. But if we are to assume that the legislature intended to exclude from compliance those vehicles which

make only occasional use of State highways, it is difficult to see why the specified splash guard should be required on foreign vehicles passing through this State. (See *Navajo Freight Lines, Inc.* v. *Bibb*, 159 F. Supp. 385.) And no basis has been suggested to support the distinction which is drawn between the vehicle 'used primarily in public construction.' There are other disparities which need not be enumerated. In our opinion the trial court properly held the added paragraph invalid."

The court further said:

"The plaintiffs have asked that we reconsider the validity of a portion of the section which was sustained in *People* v. *Warren*, 11 Ill. 2d 420, and was not changed by the 1957 amendment. After examining the points and authorities cited by the plaintiffs, we see no reason to modify our decision in *People* v. *Warren*."

In *People* v. *Warren*, 11 Ill. 2d 420, the court held reasonable and valid the 1955 version of the Mudguard Act (Ill. Rev. Stats. 1955, Ch. 95½, Par. 218 (b), Vol. 2, p. 266), which provided, as does the 1957 Act, which was in substance identical with the 1957 Act except that, in the language of the court in the *Rudolph Express Company* case "Certain minor changes in the design of the desired contour guards were made by the 1957 amendment. Their purpose appears to have been to make compliance easier in some particulars," and except that the 1957 Act exempted "motor vehicles which do not have more than 2 axles and which are used primarily in agricultural pursuits."

No question of the reasonableness of the exemptions is before this Court in the instant case and hence these exemptions are not considered in detail in this brief.

In the *Warren* case the Supreme Court said (11 Ill. 2d) at page 426:

"In the present case plaintiff in error does not question the right of the legislature to provide for and reg-

ulate the use of splash guards on motor vehicles. He poses only the question whether the legislature has properly exercised its power by the adoption of the section of the statute under attack in its present form. Tested by the rules of constitutional interpretation alluded to above, we find no merit in the contention that the provisions of that section are unreasonable, arbitrary and capricious. The splashing of water or mud upon the windshields of other vehicles on the road is an evil which the legislature rightfully aims to correct. We can give no weight to the contention of the plaintiff in error that the 'mud flaps' which were required upon all trucks under the 1951 statutes are to be preferred as more simple and inexpensive. It is within the power of the legislature to solve safety problems, by whatever means it deems best, so long as such means reasonably tend to correct the evil. *Since this police regulation is fairly appropriate to the expressed purpose of the statute, it is immaterial so far as the court is concerned, whether it is the best possible means or is inferior to the 1951 enactment which it supplants.*" (Emphasis supplied.)

The *Warren* case, adhered to in the *Rudolph Express Company* case, embodied the pronouncement of the Supreme Court of Illinois that the Illinois Mudguard Act as it stood in 1955 and as it stands now is a reasonable exercise of the police power.

To be sure, neither in the *Rudolph Express Company* case nor the *Warren* case did the court specifically consider vehicles moving only in interstate commerce. But the question of reasonableness is the same whether vehicles involved move in interstate or intrastate commerce.

II.

THERE IS A DIRECT CONFLICT OF AUTHORITY BETWEEN THE DISTRICT COURT'S DECISION IN THE INSTANT CASE AND THE DECISION OF THE SUPREME COURT OF ILLINOIS IN THE RUDOLPH EXPRESS COMPANY CASE, WHICH ADHERES TO THE WARREN CASE.

It is manifest that there is a direct conflict of authority between the district court's decision in the instant case and the decision of the Illinois Supreme Court in the *Rudolph Express Company* case, not yet reported, reprinted in full, Appendix I, which applies to the 1957 Act, that court's holding in the *Warren* case. The District Court held in the instant case that the Act is unreasonable and invalid. The *Rudolph* and *Warren* cases hold it reasonable and valid.

CONCLUSION.

For the reasons urged in the Jurisdictional Statement and in this Supplemental Brief, it is respectfully submitted that probable jurisdiction in this cause should be noted and that the judgment of the district court should be reversed.

Respectfully submitted,

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Counsel for Appellants.

WILLIAM C. WINES,
RAYMOND S. SARNOW,
A. ZOLA GROVES,
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Assistant Attorneys General,
Of Counsel.

APPENDIX I.

Docket No. 34819—Agenda 55—May, 1958.

The Rudolph Express Co. *et. al.*, Appellees, *vs.* Joseph D. Bibb, Director of Public Safety, *et al.*, Appellants.

MR. JUSTICE SCHAEFER delivered the opinion of the court:

In *People* v. *Warren*, 11 Ill. 2d 420, we sustained the validity of section 121.02 of the Uniform Act Regulating Traffic on Highways, as amended in 1955. (Ill. Rev. Stat. 1955, chap. 95½, par. 218(b).) That section required that the rear wheels of motor vehicles of the second division—those designed and used for pulling or carrying freight or for carrying more than seven passengers—be equipped with contour splash guards while being operated on State highways outside of the limits of cities, villages and incorporated towns. In 1957 the section was again amended, principally by exempting certain vehicles from its requirements. The validity of the section as amended is challenged in this case.

The plaintiffs are common and contract motor carriers of general commodities, household goods and livestock in intrastate and interstate commerce. Their complaint sought to restrain the defendants, who are public officials, from enforcing the statute. Both parties moved for summary judgment. The plaintiffs' motion was supported by affidavits; the defendants' was not. The circuit court of Sangamon County held the exemption provisions of the amendment invalid, and held also that their invalidity rendered the entire section invalid. It entered a decree for the plaintiffs, and the defendants appeal directly to this court.

As it stood when the *Warren* case was before this court, section 121.02 required that the vehicles to which it applied be equipped with rear-fender splash guards that would contour the wheel in such manner that the relationship of the inside surface of the splash guard to the tread surface of the tire or wheel would be relatively parallel, both laterally and across the wheel, at

least throughout the top ninety degrees of the rear 180 degrees of the wheel's surface. The curved surface was required to extend downward to ten inches from the ground. The splash guards were required to be wide enough to cover the full tread or treads of the tires and to be installed close enough to the tread surface of the tire or wheel to control the side-throw or wash of the bulk of the thrown material and keep it within a tangent not to exceed 15 degrees measured from a base line formed by the top height of the wheel. The splash guards could be constructed of flexible material, but they were required to be so attached that regardless of movement of the guards or the vehicles, the guards would retain their general parallel relationship to the tread surface of the tire under ordinary operating conditions.

Certain minor changes in the design of the required contour guard were made by the 1957 amendment. Their purpose appears to have been to make compliance easier in some particulars. In any event, they do not concern us here because the circuit court held that these changes did not affect the validity of the section and the plaintiffs did not cross-appeal from that ruling.

The main controversy centers upon the validity of the following paragraph which was added to section 121.02 by amendment in 1957: "This Section shall not apply to motor vehicles which do not have more than 2 axles and which are used primarily in agricultural pursuits, nor to pole trailers, dump trucks, 'ready-mix' type of cement trucks, nor to trucks used primarily for transporting grain which are dumped or unloaded by use of hoists or lifts, nor to vehicles operated principally off the highways of this state and used primarily in public construction or for purposes associated with or in aid of drilling, mining or otherwise severing of natural resources from their natural depository nor to motor vehicles operated principally within the corporate limits of a city, village or incorporated town or within a short radius thereof; provided, the Department of Public Safety may, in order to promote greater safety on the highways of this State and accomplish the purposes of this Section, adopt and promulgate reasonable rules and regulations establishing

specifications or designs for splash guards, other than the contour type of splash guard hereinbefore specified, to be used on the vehicles mentioned in this paragraph while said vehicles are operated on the highways of this State. In adopting or promulgating any such rules or regulations, the Department of Public Safety shall consider, among other things, the type of vehicle, the design or construction of the vehicle, the purpose or purposes for which the vehicle is used, the conditions or circumstances under which the vehicle operates and the distance the vehicle travels upon the highways of this State." Ill. Rev. Stat. 1957, chap. 95½, par. 218(b).

The principal question to be determined is whether this added paragraph sets up arbitrary, capricious and unreasonable classifications, in violation of section 22 of Article IV and section 14 of article II of our constitution, and the 14th amendment to the Federal constitution. Defendants maintain that the classification is reasonable and does not offend constitutional guarantees. Plaintiffs contend that the classification is discriminatory and is unrelated to the purpose of the statute, and therefore unconstitutional. No question is raised under the commerce clause of the Federal constitution.

Section 22 of article IV prohibits the General Assembly from passing any local or special law granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever. This provision, like the equal protection clause of the 14th amendment to the Federal constitution, is designed to prevent arbitrary discrimination. (*Hansen* v. *Raleigh*, 391 Ill. 356; *Michigan Millers Fire Ins. Co.* v. *McDonough*, 358 Ill. 575.) It does not prohibit legislative classification, but it does require that the classification rest on a reasonable basis and apply uniformly to all members of the class on which it operates. *City of Chicago* v. *Willett Co.*, 1 Ill. 2d 311; *Father Basil's Lodge, Inc.* v. *City of Chicago*, 393 Ill. 246.

The apparent legislative purpose of section 121.02 is to prevent or minimize the splashing of mud or water upon the windshields of other motor vehicles by vehicles of the second division while they are on State highways

outside of incorporated areas. The paragraph in question unmistakably requires that one group of those vehicles be equipped with specifically described splash guards, and provides that a second large group need not be so equipped. In support of their contention that the classification is unreasonable, plaintiffs submitted to the trial court the affidavits of two experts who asserted that many of the enumerated vehicles would cause as much or more splash than those not enumerated. For example, it is asserted that the tires of a two-axle vehicle used primarily in agricultural pursuits will splash as much mud and water on a wet highway as those of a similar vehicle used primarily in manufacturing or commercial pursuits. It is unnecessary to discuss the affidavits in detail, because the defendants conceded in their argument before this court that there is no difference in general between the splash propensities of the enumerated vehicles and those which are not enumerated.

The defendants argue, however, that the statute is to be read as requiring that all vehicles of the second division must be equipped with splash guards, although those enumerated can use a type of guard prescribed by the Department of Public Safety instead of the type prescribed by the statute. In other words, they contend that the only classification that is made relates to the type of splash guard required, and that the added paragraph should not be construed as exempting the enumerated vehicles from anti-splash measures. The statute does not support this contention. It provides that the Department "may" promulgate rules and regulations establishing specifications or designs for other types of splash guards. The language is permissive, and the Department has apparently so construed it, for it is not suggested that any rules or regulations relating to this subject have been adopted.

We read the statute, therefore, as providing that all vehicles of the second division, except those enumerated in the added paragraph, must be equipped with the guard prescribed by the statute. The enumerated vehicles may be required to have a different type of guard only if the Department sees fit to so require. We are

unable to conclude that the classification thus prescribed is reasonable.

It is true that some of the enumerated vehicles fall readily into two categories suggested by the defendants: (1) the vehicle makes only occasional use of State highways and it would be impractical to require a permanent splash guard of the kind specified when no guards at all are required on the vehicle during most of its use, and (2) the normal operation of the vehicle would cause repeated damage to the specified splash guard. But if we are to assume that the legislature intended to exclude from compliance those vehicles which make only occasional use of State highways, it is difficult to see why the specified splash guard should be required on foreign vehicles passing through this State. (See *Navajo Freight Lines, Inc.* v. *Bibb*, 159 F. Supp. 385.) And no basis has been suggested to support the distinction which is drawn between the vehicle "used primarily in public construction" and the vehicle used primarily in private construction. There are other disparities which need not be enumerated. In our opinion the trial court properly held the added paragraph invalid.

The next question is the effect of this determination on the other five paragraphs of section 121.02. There are no very reliable clews as to the legislative intent. The statute as enacted in 1935 contained a savings clause (Ill. Rev. Stat. 1957, chap. 95½, par. 239), but we are unable to draw from that fact any significant conclusion as to the intention of the General Assembly in enacting the 1957 amendment. That the General Assembly was not entirely satisfied with the section as enacted in 1955 is apparent from the adoption of the 1957 amendment. We cannot say, however, that that dissatisfaction indicated a purpose to repeal the original enactment if the added material was held invalid. The legislature intended in 1955 that the act should be operative without the invalid exemptions. There has been no clearly expressed intention to repeal the 1955 provision and we see no significant indications that would support a repeal by implication. (*People ex rel. Akin* v. *Butler Street Foundry and Iron Co.*, 201 Ill. 236,

258; *Frost* v. *Corporation Commission of Oklahoma*, 278 U. S. 515, 525-7, 73 L. ed. 483, 490; II Sutherland Statutory Construction, 3d ed. 1943, sec. 2412.) The exemption provisions of the 1957 amendment are clearly separable from those provisions of the amendment which relate to the design of the required guard.

The plaintiffs have asked what we reconsider the validity of a portion of the section which was sustained in *People* v. *Warren*, 11 Ill. 2d 420, and was not changed by the 1957 amendment. After examining the points and authorities cited by the plaintiffs, we see no reason to modify our decision in *People* v. *Warren*.

From what has been said it follows that the trial court erred in restraining the defendants from enforcing section 121.02. The decree is reversed, and the cause is remanded for the entry of a decree in accordance with this opinion.

Reversed and remanded, with direction.

CERTIFICATE OF SERVICE.

I, William C. Wines, a member of the bar of this Court and an Assistant Attorney General of the State of Illinois, hereby certify that on the 26th day of September, 1958, I served five copies of the above brief on

David Axelrod, Jack Goodman, Carl L. Steiner, Arnold L. Burke,
39 S. La Salle St., Chicago 3, Illinois, and
Max Stephenson,
308 East Adams St., Springfield, Illinois,

by mailing the same to them, sufficient postage prepaid, at their addresses of record as shown above.

.....

WILLIAM C. WINES,
Assistant Attorney General of the State of Illinois

5

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1958

No. 94

JOSEPH D. EIBR, Director of the Department of Public Safety of the State of Illinois, and WILLIAM H. MORRIS, Superintendent of the Division of State Highway Police, Department of Public Safety of the State of Illinois,

Appellants,

vs.

NAVAJO FREIGHT LINES, INC., a New Mexico corporation, RINGSBY TRUCK LINES, INC., a Nebraska corporation, PRUCKA TRANSPORTATION, INC., a Nebraska corporation, DENVER-CHICAGO TRUCKING CO., INC., a Nebraska corporation, WATSON BROS. TRANSPORTATION CO., INC., a Nebraska corporation, PACIFIC INTERMOUNTAIN EXPRESS CO., a Nevada corporation, ARKANSAS-BEST FREIGHT SYSTEM, INC., an Arkansas corporation, and SCHERER FREIGHT LINES, INC., an Illinois corporation,

Appellees.

(APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS, SOUTHERN DIVISION.)

BRIEF FOR APPELLANTS

Certificate of Service Appended at Page 20.

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INDEX

PAGE

Reference to the Report of the Opinion Delivered in the District Court 1

Statement of the Grounds on which Jurisdiction of this Court is Invoked 2

The Statutory Provision Conferring on this Court Jurisdiction of This Appeal 2

Cases Believed to Sustain the Jurisdiction of this Court 2

The Text and Citation of the Statute Involved 3

The Questions Presented by this Appeal 5

Statement of the Case 6

Argument:

I—The Illinois Mudguard Act is a reasonable exercise of Illinois' police power over her highways. It is therefore valid even though it imposes a burden on interstate commerce 10

The Supreme Court of Illinois Has Sustained the Reasonableness of the Instant Measure 13

The Evidence sustains the Reasonableness and Validity of the Statute 16

Certificate of Service 20

APPENDICES.

I—Opinion of statutory three-judge district court Navajo Freight Lines, Inc. v. Bibb, 159 F. Supp. 385 ..... App. 1 to 16

II—Findings and Conclusions of Law, three-judge district court, Navajo Freight Lines, Inc, v. Bibb ..... App. 17-22

III—Decree appealed from ..... App. 23-24

IV—People v. Warren, 11 Ill. 2d 420 ..... App. 25-31

V—Illinois Mudguard Act (Ill. Rev. Stat. 1955, Ch. 95½, Par. 218-b, Vol. II, p. 226) ..... App. 32-33

VI—Rudolph Express Co. v. Bibb, 15 Ill. 2d 67 ..... App. 34-38

CASES AND STATUTES CITED.

Sec. 1253 Judicial Code (28 U. S. C. Sec. 1253, Act of June 25, 1945, C. 646, 62 Stats. 926) 2

Illinois Mudguard Act of 1957 (Ill. Rev. Stat. 1957, Ch. 95½, Par. 218-b, Vol. 2, p. 724) 3, 6, 13-14

Illinois Mudguard Act of 1955, (Ill. Rev. Stat. 1955, Ch. 95½, Par. 218-b, Vol. II, p. 226) 13

Kelly v. Washington, 302 U. S. 1 17

Maurer v. Hamilton, 309 U. S. 598, 603 ..... 2, 11, 18

Morgan v. Virginia, 328 U. S. 373 17

People v. Warren, 11 Ill. 2d 420 ..... 6, 13

Rudolph Express Co. v. Bibb, 15 Ill. 2d 67 ..... 6, 16

South Carolina Highway Dept. v. Barnwell Bros., 303 U. S. 177, 190, 191 ..... 2, 10, 18

Southern Pac. Co. v. Arizona, 325 U. S. 761 17

Sproles v. Binford, 286 U. S. 374 ..... 2, 12, 18

IN THE

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OCTOBER TERM, A. D. 1958

No. 94

JOSEPH D. BIBB, Director of the Department of Public Safety of the State of Illinois, and WILLIAM H. MORRIS, Superintendent of the Division of State Highway Police, Department of Public Safety of the State of Illinois,

Appellants,

vs.

NAVAJO FREIGHT LINES, INC., a New Mexico corporation, RINGSBY TRUCK LINES, INC., a Nebraska corporation, PRUCKA TRANSPORTATION, INC., a Nebraska corporation, DENVER CHICAGO TRUCKING CO., INC., a Nebraska corporation, WATSON BROS. TRANSPORTATION CO., INC., a Nebraska corporation, PACIFIC INTERMOUNTAIN EXPRESS CO., a Nevada corporation, ARKANSAS-BEST FREIGHT SYSTEM, INC., an Arkansas corporation, and SCHERER FREIGHT LINES, INC., an Illinois corporation,

Appellees.

(APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS, SOUTHERN DIVISION.)

BRIEF FOR APPELLANTS.

REFERENCE TO THE REPORT OF THE OPINION DELIVERED IN THE DISTRICT COURT.

The opinion of the statutory three-judge district court is reported as *Navajo Freight Lines, Inc.* v. *Bibb*, 159 F. Supp. 385, and is printed in full as Appendix I to this brief, App. pp. 1 to 16, *post*.

STATEMENT OF THE GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED.

The Statutory Provision Conferring on this Court Jurisdiction of This Appeal.

This appeal is taken pursuant to Section 1253 of the Judicial Code (28 U. S. C. Sec. 1253, Act of June 25, 1945, C. 646, 62 Stats. 926), which authorizes direct appeals to this Court from judgments of injunction by three-judge district courts.

Cases Believed to Sustain the Jurisdiction of This Court.

Cases believed to sustain the jurisdiction of this Court are:

Maurer v. *Hamilton*, 309 U. S. 598, 603.
South Carolina Highway Dept. v. *Barnwell Bros.*, 303 U. S. 177, 190, 191.
Sprolès v. *Binford*, 286 U. S. 374.

The decree was dated March 10, 1958, and was entered March 19, 1958 (Rec. 312-313).

The notice of appeal, with certificate of service, was filed on May 8, 1959, within sixty days after the date of the signing and entering of the decree in the United States District Court for the Southern District of Illinois, Southern Division, which court then had custody of the record in the case.

The Text and Citation of the Statute Involved.

The validity of the following statutory provisions of the State of Illinois is involved:

218b. Rear fender splash guards.] § 121.02. It is unlawful for any person to operate any motor vehicle of the second division upon the highways of this state outside the corporate limits of a city, village or incorporated town unless such vehicle is equipped with rear fender splash guards which shall comply with the specifications hereinafter provided in this Section; except that any motor vehicle of the second division which is or has been purchased, new or used, prior to August 1, 1957 shall be equipped with rear fender splash guards which are so attached as to prevent the splashing of mud or water upon the windshield of other motor vehicles and such splash guards on such vehicle shall not be required to comply with the specifications hereinafter provided in this Section until January 1, 1958.

The rear fender splash guards shall contour the wheel in such a manner that the relationship of the inside surface of any such splash guard to the tread surface of the tire or wheel shall be relatively parallel, both laterally and across the wheel, at least throughout the top 90 degrees of the rear 180 degrees of the wheel surface; provided however, on vehicles which have a clearance of less than 5 inches between the top of the tire or wheel and that part of the body of the vehicle directly above the tire or wheel when the vehicle is loaded to maximum legal capacity the curved portion of the splash guard need only extend from a point directly behind the center of the rear axle and to the rear of the wheel surface upwards to within at least 2 inches of the bottom line of the body when the vehicle is loaded to maximum legal capacity. On all vehicles to which this Section applies, there shall be a downward extension of the curved surface which shall end not more than 10 inches from the ground when the vehicle is loaded to maximum legal capacity. This downward extension shall be part of the curved surface or

attached directly to said curved surface, but it need not contour the wheel.

The splash guards shall be wide enough to cover the full tread or treads of the tires being protected and shall be installed not more than 6 inches from the tread surface of the tire or wheel when the vehicle is loaded to maximum legal capacity. The splash guard shall have a lip or flange on its outside edge to minimize side throw and splash. The lip or flange shall extend toward the center of the wheel, and shall be perpendicular to and extend not less than 2 inches below the inside or bottom surface line or plane of the guard.

The splash guards may be constructed of a rigid or flexible material, but shall be attached in such a manner that, regardless of movement, either by the splash guards or the vehicle, the splash guards will retain their general parallel relationship to the tread surface of the tire or wheel under all ordinary operating conditions.

This Section shall not apply to motor vehicles whose construction or design does not require such splash guards, nor to motor vehicles in-transit and capable only of using temporary splash guards approved by the Illinois State Highway Police.

This Section shall not apply to motor vehicles which do not have more than 2 axles and which are used primarily in agricultural pursuits, nor to pole trailers, dump trucks, "ready-mix" type of cement trucks, nor to trucks used primarily for transporting grain which are dumped or unloaded by use of hoists or lifts, nor to vehicles operated principally off the highways of this state and used primarily in public construction or for purposes associated with or in aid of drilling, mining or otherwise severing of natural resources from their natural depository nor to motor vehicles operated principally within the corporate limits of a city, village or incorporated town or within a short radius thereof; provided, the Department of Public Safety may, in order to promote greater safety on the highways of this State and accomplish the purposes of this Section, adopt and promulgate reasonable rules and regulations establishing specifications or designs

for splash guards, other than the contour type of splash guard hereinbefore specified, to be used on the vehicles mentioned in this paragraph while said vehicles are operated on the highways of this State. In adopting or promulgating any such rules or regulations, the Department of Public Safety shall consider, among other things, the type of vehicle, the design or construction of the vehicle, the purpose or purposes for which the vehicle is used, the conditions or circumstances under which the vehicle operates and the distance the vehicle travels upon the highways of this State. As amended by act approved July 8, 1957. L. 1957, p. 1951, H.B. No. 157.

Section added: L. 1951, p. 942.

THE QUESTIONS PRESENTED BY THIS APPEAL.

The questions presented by this appeal are:

A. Does Section 121.02 of Illinois' Act Regulating Traffic on Highways (Ill. Revised Stats. 1957, Chap. 95½, Par. 218b, Vol. 2, p. 724), requiring contact splash fenders or splash guards over and behind the rear wheels of certain motor trucks and trailers, unreasonably burden interstate commerce in violation of Article I, Section 8, of the Constitution of the United States, which provides as follows:

> "The Congress shall have power . . . to regulate commerce among the several States. . . ."

and Article IV, Clause 2, of the Constitution of the United States, which provides as follows:

> "This Constitution . . . shall be the supreme Law of the Land; and the judges in every State shall be bound thereby, and anything in the Constitution or Laws of any State to the contrary notwithstanding."?

B. Is the Act within the police power of the State of Illinois reserved to the States under the provisions of the Tenth Amendment to the Constitution of the United States?

STATEMENT OF THE CASE.

Appellees, corporations operating trucks with trailers in interstate commerce and in Illinois under certificates of public convenience and necessity issued by the Interstate Commerce Commission, filed this suit to restrain the enforcement of an Illinois statute enacted in 1957 which requires "contour" mud guards on trucks and trailers in Illinois. (Ill. Rev. Stat. 1957, Ch. 95½, Par. 218b, Vol. 2, p. 724, reprinted in full, *ante*, pp. 3-6). The Supreme Court of Illinois has sustained the 1957 Act here in question as a reasonable exercise of the police power. (*Rudolph Express Co.* v. *Bibb*, 15 Ill. 2d 67, opinion reprinted in full, App. VI, *post*, App. pp. 34-38). It had previously sustained the validity of a 1955 predecessor act (Ill. Rev. Stats. 1955, Ch. 95½, par. 218b, Vol. II, p. 226), which did not differ from the 1957 version of the Act in any respect drawn in question here. *People* v. *Warren*, 11 Ill. 2d 420, opinion reprinted in full, App. IV, *post*, App. pp. 25-31.

The specifications required by the statute are thus summarized by the District Court:

> "The Act under attack, entitled 'rear fender splash guards', provides:
>
> > "It is unlawful for any person to operate any motor vehicle * * * upon the highways of this state * * * unless such vehicle is equipped with rear fender splash guards which shall comply with the specifications hereinafter provided in this Section * * *".
>
> "The specifications require that the splash guards (1) contour under the wheel; (2) cover the top 90° of the rear 180° (excepting vehicles of less than five inches clearance, and requiring that they contour within ten inches of the body); (3) extend downward to within ten inches of the ground; (4) have a lip or flange of two inches upon the outside edge, and (5) retain its gen-

eral parallel condition under all operating conditions when mounted as required by the statute not more than six inches from the tread when fully loaded." (*Opinion*, Appendix I, p. 2.)

A three-judge District Court, having granted a temporary injunction restraining the enforcement of the statute, made that injunction permanent by final decree. (App. III, *post*, Rec. 312-313). The Court's memorandum of opinion (Rec. 290-306) appears as Appendix I to this Statement (App., pp. 1-16, *post*). That Court's Findings of Fact and Conclusions of Law (Rec. 306) appear as Appendix II (App., pp. 17-22). The decree appealed from (Rec. 562) appears as Appendix III (App., pp. 23-24).

In substance, the District Court found that compliance with the Act for vehicles used by appellees would cost each of them in excess of $3,000, that the Arkansas Public Service Commission has issued an order requiring that all vehicles using Arkansas highways be equipped with flat, apron type mudguards parallel to the rear axle, that it is impossible for a splash guard to comply with the Illinois Splash Guard Act and the Arkansas Public Service Commission order, that splash guards permitted in forty-five states are illegal in Illinois, that each of appellees interchanges trailers with carriers throughout the United States, that it will be impractical and in most cases impossible for plaintiffs to equip trailers with the splash guards required by Illinois and that the Act unreasonably burdens interstate commerce (Findings of Fact, Rec. 306-311, App. II, App. 17-22).

The District Court also found that if the contour type mudguards become detached from the vehicle upon which they are mounted, they create a hazard upon public highways (Rec. 559).

The District Court therefore found the Act an unreasonable burden on interstate commerce (Rec. 555).

The substance of appellees' evidence has been embodied in the District Court's findings of fact (Appendix II, pp. 306 to 311, *post*), and opinion (Appendix I, pp. 290 to 306, *post*), as summarized in the preceding paragraph. We do not repeat that summary.

The evidence for appellants, not summarized in the Court's opinion or reflected in its Findings of Fact, is that a plastic contour splash guard when backed into an object such as a loading ramp or post (Rec. 190), snaps back into position and is not damaged. Even when a plastic contour splash guard was subjected to ten times the vibration that you would get on the road, it was not damaged (Rec. 192).

A contour splash guard, unlike a "flat" or "apron" type mud guard, will throw debris down instead of straight out (Rec. 201, 222). When one is driving behind a unit that has inadequate splash guards, mud and water is thrown all over the windshield of a following vehicle with momentary loss of vision. When one loses vision he drops the side of his car off the paved area of the road and many accidents are caused by trying to right the car from such rolling (Rec. 203).

Contour splash guards prevent mud and water from splashing upon and obscuring stop and flicker lights and license plates (Rec. 213).

When the front vehicle is equipped with contour guards, a vehicle following can drive within twenty or thirty feet of the unit with no trouble in keeping the windshield clean (Rec. 222).

A captain of the Illinois State Highways Police testified that he knew of no accidents that had been caused by con-

tour splash guards (Rec. 222). He also testified that he knew of no accidents from the flat type of mudguards (Rec. 222).

The district court ignored the testimony of the defendants' witness Leonard Cooper, president of Precision Mold and Tool Corporation, vice president, secretary and treasurer of the Plastic Surface Corporation and a manufacturer of mudguards meeting the requirements of the Illinois statute involved in this case, (Rec. 182-3) who, asked as to whether the type of mudguard that he manufactures is "one that can be carried in the vehicle and readily put on, say, at a state border, and then removed as it leaves Illinois," testified from personal experience that a mechanic who had no prior experience of installing such mudguards on a trailer could install such mudguards on a single axle vehicle in one hour and that it would take "a little longer" to mount such mudguards on a two-axle vehicle. (Rec. 191.)

ARGUMENT.

I.

The Illinois Mudguard Act is a reasonable exercise of Illinois' police power over her highways. It is therefore valid even though it imposes a burden on interstate commerce.

The District Court has stricken down a measure enacted by Illinois for the prevention of accidents on that State's highways. There is no doubt as to the general principles of constitutional law that must govern this case.

The first of the principles is that a State may adopt reasonable means for the protection of life, limb and property within its borders even though such measures entail a substantial burden upon interstate commerce. More particularly, a State may enact reasonable regulations of the type and equipment of vehicles, including motor trucks, traveling upon the State's highways even though such vehicles move solely in interstate commerce and are of origins foreign to the State itself.

In *South Carolina Highway Department* v. *Barnwell Bros., Inc.*, 303 U. S. 161, this Court, overturning the decision of a three-judge district court, held valid the provisions of a South Carolina statute prohibiting the "use on state highways of motor trucks and 'semi-trailer motor trucks' whose width exceeds ninety inches, and whose weight including loads exceeds twenty thousand pounds."

The Court said at page 189:

> "The nature of the authority of the state over its own highways has often been pointed out by this Court. It may not, under the guise of regulation, discriminate against interstate commerce. But 'In the absence of

national legislation especially covering the subject of interstate commerce, the State may rightly prescribe uniform regulations adopted to promote safety upon its highways and the conservation of their use, applicable alike to vehicles moving in interstate commerce and those of its own citizens.' *Morris* v. *Duby*, 274 U. S. 135, 143. This formulation has been repeatedly affirmed, *Clark* v. *Poor*, 274 U. S. 554, 557; *Sprout* v. *South Bend*, 277 U. S. 163, 169; *Sproles* v. *Binford*, 286 U. S. 374, 389, 390; cf. *Morf* v. *Bingaman*, 298 U. S. 407, and never disapproved. This Court has often sustained the exercise of that power although it has burdened or impeded interstate commerce. It has upheld weight limitations lower than those presently imposed, applied alike to motor traffic moving interstate and intrastate. *Morris* v. *Duby, supra; Sproles* v. *Binford, supra.* Restrictions favoring passenger traffic over the carriage of interstate merchandise by truck have been similarly sustained, *Sproles* v. *Binford, supra; Bradley* v. *Public Utilities Comm'n*, 289 U. S. 92, as has the exaction of a reasonable fee for the use of the highways. *Hendrick* v. *Maryland*, 235 U. S. 610; *Kane* v. *New Jersey*, 242 U. S. 160; *Interstate Busses Corp.* v. *Blodgett*, 276 U. S. 245; *Morf* v. *Bingaman, supra*; cf. *Ingels* v. *Morf*, 300 U. S. 290."

In *Maurer* v. *Hamilton*, 309 U. S. 598, this Court sustained as to trucks traveling in interstate commerce a statute of Pennsylvania "prohibiting the operation over its highways of any motor vehicle carrying any other vehicle over the head of the operator of such carrier vehicle." The Court sustained this statute notwithstanding the Motor Carrier Act of 1935.

The Court said at pages 603-04:

"Only a word need be said of the constitutional objections. The present record lays a firm foundation for the exercise of state regulatory power, unless the state has been deprived of that power by Congressional action authorizing the Commission to substitute its judgment for that of the state legislature as to the need and propriety of the state regulation. The nature and

extent of the state power, in the absence of Congressional action, to regulate the use of its highways by vehicles engaged in interstate commerce has so recently been considered by this Court that it is unnecessary to review the authorities now, or to restate the standards which define the state power to prescribe regulations adapted to promote safety upon its highways and to insure their conservation and convenient use by the public. See *South Carolina Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177. Judged by these standards we can find no basis for saying that the Pennsylvania statute is not such a regulation or that it is a denial of due process or that it infringes the commerce clause if Congress has not authorized the Interstate Commerce Commission to promulgate a conflicting rule."

In *Sproles* v. *Binford*, 286 U. S. 374, this Court sustained as to trucks traveling in interstate commerce provisions of the Motor Vehicle Act of Texas prohibiting "the operation on any highway of 'any vehicle' as defined, exceeding stated limitations of size, or any vehicle not constructed or equipped as required, and also the transportation of any load exceeding the dimensions and weights prescribed." After holding that the Act did not deprive appellants of their proeprty without due process of law (no question of due process is raised in the instant case), the Court, speaking through Chief Justice Hughes, said at pages 389-90:

"The objection to the prescribed limitation as repugnant to the commerce clause is also without merit. The Court, in *Morris* v. *Duby*, *supra*, at p. 143, answered a similar objection to the limitation of weight by the following statement, which is applicable here: 'An examination of the acts of Congress discloses no provision, express or implied, by which there is withheld from the State its ordinary police power to conserve the highways in the interest of the public and to prescribe such reasonable regulations for their use as may be wise to prevent injury and damage to them. In the absence of national legislation especially covering the subject of interstate commerce, the State may rightly

prescribe uniform regulations adapted to promote safety upon its highways and the conservation of their use, applicable alike to vehicles moving in interstate commerce and those of its own citizens. In the instant case, there is no discrimination against interstate commerce and the regulations adopted by the State, assuming them to be otherwise valid, fall within the established principle that in matters admitting of diversity of treatment, according to the special requirements of local conditions, the States may act within their respective jurisdictions until Congress sees fit to act."

The Supreme Court of Illinois Has Sustained the Reasonableness of the Instant Measure.

In *People* v. *Warren*, 11 Ill. 2d 420, opinion reprinted in full, Appendix IV, pp. 25 to 31, *post*, the Supreme Court of Illinois considered the Illinois Mudguard Act in its 1955 form (Ill. Rev. Stat. 1955, Ch. 95½, Par. 218-b, Vol. II, p. 226).

The 1955 form of the Act did not differ substantially from the 1957 version of the Act as amended except that the 1957 version of the act make compliance easier in some particulars and to exempt "motor vehicles which do not have more than two axles which are used primarily in agricultural pursuits."

The 1955 version of the Illinois Mudguard Act (Ill. Rev. Stat. 1955, Ch. 95½, Par. 218-b, Vol. II, p. 226) is set forth in full as Appendix V to this brief (pp. 32 to 33, *post*). The effect of the amendments is summarized in the margin.[1]

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[1] The amendment makes the Act applicable only to "any new motor vehicle of the second division which is purchased on or after September 1, 1955, or any motor vehicle of the second division the splash guards of which have been replaced on and after September 1, 1955, which replacement shall be necessary when present splash guards are unable to prevent the splashing of mud or water upon the windshield of other motor vehicles, upon the highways * * *" outside the corporate limits "unless such vehicle is equipped with rear fender splash guards which shall comply with the specifications as hereinafter provided and such splash guards shall be so attached as to prevent the splashing of mud or water upon the windshield of other motor vehicles; provided, that on

Footnote continued on next page

The court said at page 426 (*People* v. *Warren*, 11 Ill. 2d 420):

"In the present case plaintiff in error does not question the right of the legislature to provide for and regulate the use of splash guards on motor vehicles. He poses only the question whether the legislature has properly exercised its power by the adoption of the section of the statute under attack in its present form. Tested by the rules of constitutional interpretation alluded to above, we find no merit in the contention that the provisions of that section are unreasonable, arbitrary and capricious. The splashing of water or mud upon the windshields of other vehicles on the road is

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and after January 1, 1957, this amendatory Act of 1955 shall apply to all motor vehicles of the second division."

The 1955 Act had the additional requirement, eliminated by the 1957 Act, that the mudguard must extend to a length that shall end "not more than 10 inches from the ground."

The 1957 Amendment provides that as to vehicles "which have a clearance of less than 5 inches between the top of the tire or wheel and that part of the body of the vehicle directly above the tire or wheel when the vehicle is loaded to maximum legal capacity, the curved portion of the splash guard need only extend from a point directly behind the center of the rear axle to the rear of the wheel surface upwards to within at least 2 inches of the bottom line of the body when the vehicle is loaded to maximum legal capacity."

The 1957 Act requires a downward extension of the curved surface which shall end not more than 10 inches from the ground when the vehicle is loaded to maximum legal capacity" but provides that while such extension "shall be part of the curved surface or attached directly to the curved surface," it "need not contour the wheel."

The 1955 Act required that the "splash guards shall be wide enough to cover the full trend [*sic*] or treads of the tires being protected and shall be installed close enough to the tread surface of the tire or wheel as to control the side-throw or wash of the bulk of the thrown road surface material and keep such bulk within a tangent not to exceed 15 degrees measured from a base line formed by the top height of the wheel."

The 1957 Act merely requires that the splash guards be wide enough to cover the full tread or treads of the tires being protected and shall be installed not more than 6 inches from the tread surface of the tire or wheel when the vehicle is loaded to maximum legal capacity. The splash guard shall have a lip or flange on its outside edge to minimize side throw and splash. The lip or flange shall extend toward the center of the wheel, and shall be perpendicular to and extend not less than 2 inches below the inside or bottom surface line or plane of the guard.

The splash guards may be constructed of a rigid or flexible material, but shall be attached in such a manner that, regardless of movement, either by the splash guards or the vehicle, the splash guards will retain

Footnote continued on next page

an evil which the legislature rightfully aims to correct. We can give no weight to the contention of the plaintiff in error that the 'mud flaps' which were required upon all trucks under the 1951 statutes are to be preferred as more simple and inexpensive. It is within the power of the legislature to solve safety problems, by whatever means it deems best, so long as such means reasonably tend to correct the evil. *Since this police regulation is fairly appropriate to the expressed purpose of the statute, it is immaterial so far as the court is concerned, whether it is the best possible means or is inferior to the 1951 enactment which it supplants.*" (Emphasis supplied.)

The reasonableness of the 1957 version of the Act, the version under attack in this case, was before the Supreme

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their general parallel relationship to the tread surface of the tire or wheel under all ordinary operating conditions.

This Section shall not apply to motor vehicles whose construction or design does not require such splash guards, nor to motor vehicles in transit and capable only of using temporary splash guards approved by the Illinois State Highway Police.

The 1957 Amendment enacts certain exemptions from the Act in question here.

That section is as follows:

This Section shall not apply to motor vehicles which do not have more than 2 axles and which are used primarily in agricultural pursuits, nor to pole trailers, dump trucks, "ready-mix" type of cement trucks, nor to trucks used primarily for transporting grain which are dumped or unloaded by use of hoists or lifts, nor to vehicles operated principally off the highways of this state and used primarily in public construction or for purposes associated with or in aid of drilling, mining or otherwise severing of natural resources from their natural depository nor to motor vehicles operated principally within the corporate limits of a city, village or incorporated town or within a short radius thereof; provided, the Department of Public Safety may, in order to promote greater safety on the highways of this State and accomplish the purposes of this Section, adopt and promulgate reasonable rules and regulations establishing specifications or designs for splash guards, other than the contour type of splash guard hereinbefore specified, to be used on the vehicles mentioned in this paragraph while said vehicles are operated on the highways of this State. In adopting or promulgating any such rules or regulations, the Department of Public Safety shall consider, among other things, the type of vehicle, the design or construction of the vehicle, the purpose or purposes for which the vehicle is used, the conditions or circumstances under which the vehicle operates and the distance the vehicle travels upon the highways of this State. 1935, July 9, Laws 1935, p. 1247, art. XV, § 121.02, added 1951, July 2, Laws 1951, p. 942, § 1, as amended 1955, July 15, Laws 1955, p. 2133, § 1; 1957, July 8, Laws 1957, p. ——, H. B. No. 157, § 1.

(Ill. Rev. Stat. 1957, Ch. 95½, Par. 218-b, Vol. II, p. 725).

Court of Illinois in *Rudolph Express Co.* v. *Bibb*, 15 Ill. 2d 67, reprinted in full as Appendix VI, pp. 34 to 38, *post*.

While the *Rudolph Express Company* case dealt principally with exemptions from the Act that are not challenged in this case but are summarized in the marginal note heretofore cited (1), the Supreme Court, reconsidering its opinion in the *Warren* case, said (15 Ill. 2d 76, at p. 82):

> "After examining the points and authorities cited by the plaintiffs, we see no reason to modify our decision in *People* v. *Warren*."

The Evidence sustains the Reasonableness and Validity of the Statute.

The defendants' evidence summarized in the Statement of the Case, *ante*, is that a contour splash guard, unlike a "flat" or "apron" type of mudguard will throw *debris* down instead of straight out (Rec. 201, 222) and will thus prevent its being hurled into faces of drivers passing the vehicle equipped with contour splash guards. Such contour splash guards will prevent also mud and water from being thrown upon the windshield of a following vehicle with momentary loss of vision (Rec. 222). When one thus loses vision, he tends to drop the side of his car off of the paved area of the road. Many accidents are caused by trying to right the car from such rolling (Rec. 203).

The evidence also shows that contour splash guards prevent mud and water from splashing upon and obscuring stop and flicker lights and license places (Rec. 213).

When the front vehicle is equipped with contour guards, a following vehicle can drive within twenty or thirty feet of the unit with no trouble in keeping the windshield clear (Rec. 222).

A captain of the Illinois State Highway Police testified that he knew of no accidents that had been caused by contour splash guards (Rec. 222).

It thus appears that the statute enacts a reasonable regulation of trucks on Illinois' highways well within the police power of that State reserved to it by the Tenth Amendment and that any burden that it imposes on interstate commerce is not such as to render it unconstitutional.

Appellees rely upon *Southern Pac. Co.* v. *Arizona*, 325 U. S. 761, which invalidated a statute of Arizona that prescribed a maximum length of 70 cars for trains moving within that State. But that case involved a railroad built and operated by private interests. It did not involve highways constructed by a State. The instant case involves only traffic moving upon State highways. Furthermore there was a substantial showing in the *Southern Pacific Company* case that shorter trains would mean more numerous trains and that the minimization in the number of accidents due to shorter trains would be more than offset by the increase in accidents caused by more numerous trains.

Appellees cite *Morgan* v. *Virginia*, 328 U. S. 373. In that case this Court struck down a statute of the State of Virginia that required "all passenger motor vehicle carriers, both interstate and intrastate, to separate without discrimination, the white and colored passengers in their motor busses so that contiguous seats will not be occupied by persons of different races at the same time." No question of preserving life or bodily safety was involved in the *Morgan* case.

Appellees also cite *Kelly* v. *Washington*, 302 U. S. 1. But in that case this Court *did not* strike down the state statute assailed, which was one enacting "a comprehensive code" regulating in the interests of safety vessels moving in Washington upon navigable waters and in interstate and foreign commerce. On the contrary, this Court, *reversing* a judgment of the State court invalidating the Act, remanded the

cause for further proceedings to be conducted with a view to ascertaining whether "standards as to structure, design, equipment and operation" of such vessels were such as to "pass beyond what is plainly essential to safety and seaworthiness".

The Court sustained provisions of the Act providing for State "inspection of hull and machinery of respondents' facilities in order to insure safety and seaworthiness."

The Court said at page 16:

> "Our conclusion is that the state Act has a permissible field of operation in relation to respondents' tugs and that the state court was in error in holding the Act completely unenforceable in deference to federal law."

It is, we think, highly significant that appellees do not cite a single case invalidating a State statute regulating vehicles on the State's highway where safety is the object of the statute.

Appellees have argued in their Motion to Affirm that regulations of the character of those embodied in the Illinois Act involved in this case, if they are to be adopted at all, are of such character that they should be uniform and hence should be imposed by Act of Congress or Federal administrative regulation authorized by congressional act. But such an argument, if sound, would have found countenance in this Court's decisions in *Maurer* v. *Hamilton*, 309 U. S. 598, already considered, sustaining a Pennsylvania regulation prohibiting the operation of motor vehicles carrying any other vehicle over the head of the operator, in *Sproles* v. *Binford*, 286 U. S. 374, sustaining an Act specifying limitations of size, type of equipment and maximum weight of loads with respect to trucks, and *South Carolina Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177, already considered, sustaining a State act limiting the width of "motor trucks and 'semitrailer motor trucks' whose width

exceeds ninety inches, and whose weight including loads exceeds twenty thousand pounds."

Appellees point to a regulation of Arkansas that requires a flat type of mudguard. But, as we have noted in the Statement of the Case, *ante*, the defendants' evidence, ignored by the trial court, shows that mudguards of the type required by the Illinois statute can be installed at the border of Illinois by a mechanic without prior experience in an hour for a one-axle vehicle and slightly more than that for a two-axle vehicle. (Rec. 182-3.) To be sure, such installation will occasion some delay or about an hour or more. But delay is a small price to pay for the preserving of lives and the prevention of injuries upon the public highways.

These considerations demonstrate that the statute is a reasonable exercise of the State's police power, that the District Court has departed from the constitutional norms apposite to the questions presented, that it has made a legislative, not a judicial determination of those questions and that it has improperly granted the injunction appealed from.

Respectfully submitted,

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CERTIFICATE OF SERVICE.

I, William C. Wines, one of counsel for appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on or before the 9th day of January, 1959, I served copies of the foregoing Brief for Appellants on Appellees, as follows:

By mailing of five copies of said Brief for Appellants to

Axelrod, Goodman and Steiner
39 South La Salle Street
Suite 703
Chicago 3, Illinois

Arnold Lloyd Burke
100 W. Monroe Street
Suite 1410
Chicago 3, Illinois

Stephenson and Routman
208 W. Adams Street
Springfield, Illinois

Harper, Harper and Young
Kelly Building
Ft. Smith, Arkansas

in duly addressed envelopes, postage prepaid.

WILLIAM C. WINES
One of Counsel for Appellants.

APPENDIX I.

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS
SOUTHERN DIVISION

Navajo Freight Lines, Inc.,
a New Mexico corporation,
Ringsby Truck Lines, Inc.,
a Nebraska corporation,
Prucka Transportation, Inc.,
A Nebraska corporation,
Denver Chicago Trucking Co., Inc.,
A Nebraska corporation,
Watson Bros. Transportation Co., Inc.,
a Nebraska corporation and
Pacific Intermountain Express Co.,
a Nevada corporation,
Plaintiffs,

and

Arkansas-Best Freight System, Inc.,
an Arkansas corporation,
Intervenor,

vs.

Joseph D. Bibb, Director of the Department of Public Safety of the State of Illinois,

and

William H. Morris, Superintendent of the Division of State Highway Police, Department of Public Safety of the State of Illinois,
Defendants.

Civil Action
No. 2438
For Declaratory
Judgment and
Injunctive
Relief

February 26, 1958

Before MAJOR, Circuit Judge, BRIGGLE and MERCER, District Judges.

MAJOR, Circuit Judge. Plaintiffs instituted this proceeding, praying for a declaratory judgment that Sec. 121.02

of the Uniform Act Regulating Traffic on Highways, being Sec. 218b of Chap. 95½, as amended (Ill. Rev. Stat.), effective July 8, 1957 (hereinafter referred to as the Act), be held unconstitutional and void, and that defendants be enjoined from enforcing or instituting proceedings against plaintiffs under the Act. Arkansas-Best Freight System, Inc. was granted leave to intervene. The District Court issued a temporary restraining order.

On January 15, 1958, a three-Judge Court was convened in accordance with the requirements of Title 28 U. S. C. A. Sec. 2284. On January 15 and 16, 1958, the Court heard testimony offered by the respective parties, as well as argument of conusel, at the conclusion of which the matter was taken under advisement.

The Act under attack, entitled "Rear fender splash guards," provides:

> "It is unlawful for any person to operate any motor vehicle * * * upon the highways of this state * * * unless such vehicle is equipped with rear fender splash guards which shall comply with the specifications hereinafter provided in this Section * * *."

The specifications require that the splash guards (1) contour under the wheel; (2) cover the top 90° of the rear 180° (excepting vehicles of less than five inches clearance, and requiring that they contour within two inches of the body); (3) extend downward to within ten inches of the ground; (4) have a lip or flange of two inches upon the outside edge, and (5) retain its general parallel condition under all operating conditions when mounted as required by the statute not more than six inches from the tread when fully loaded.

Plaintiffs named in the caption are all corporations organized and existing under laws of states other than Illinois. They are all engaged in the transportation of property by motor vehicle as a common carrier in interstate commerce generally over regular routes. They all operate pursuant to a certificate of public convenience and necessity issued by the Interstate Commerce Commission. None of the plaintiffs other than Watson Bros. rendered any intrastate transportation in Illinois and hold no authority from the Illinois Commerce Commission to operate in such commerce. Watson Bros. operates to a limited extent in intrastate com-

merce in Illinois, for which it holds authority from the Illinois Commerce Commission.

Joseph D. Bibb is director of the Department of Public Safety of the State of Illinois, which department maintains the division known as the State Highway Police, of which defendant William H. Morris is Superintendent. These officials are charged with the duty and responsibility of enforcing the provisions of the Uniform Act Regulating Traffic on Highways, including the section involved in this proceeding.

Notwithstanding our findings of fact and conclusions of law entered concurrently with this opinion, we deem it advisable to elaborate on the factual as well as the legal situation. Navajo Freight Lines, Inc. (hereafter Navajo) is a New Mexico corporation with its principal office at Denver, Colorado. It operates between points in the states of Arizona, California, Colorado, Illinois, Indiana, Iowa, Kansas, Missouri, Nebraska, Nevada, New Mexico Oklahoma and Texas. It operates approximately 32 million miles per year in interstate commerce, with 7% of its mileage over Illinois highways. Ringsby Truck Lines, Inc. (hereafter Ringsby) is a Nebraska corporation and operates between points in the states of California, Colorado, Illinois, Iowa, Kansas, Missouri, Nebraska, Nevada, Utah and Wyoming. It operates approximately 30 million miles per year in interstate commerce, of which 3% is over Illinois highways. Prucka Transportation, Inc. (hereafter Prucka) is a Nebraska corporation and operates between points in the states of Colorado, Illinois, Indiana, Iowa, Kansas, Missouri, Nebraska and Wyoming. It operates approximately 5 million miles per year in interstate commerce, of which 5% is over Illinois highways. Denver Chicago Trucking Co., Inc. (hereafter Denver) is a Nebraska corporation operating between points in the states of Arizona, California, Colorado, Connecticut, Idaho, Illinois, Indiana, Kansas, Massachusetts, Michigan, Missouri, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Utah, Washington and Wyoming. It operates approximately 57 million miles per year in interstate commerce, of which approximately 4% is over Illinois highways. Watson Bros. Transportation Co., Inc. (hereafter Watson) is a Nebraska corporation and operates between points in the states of Arizona, California, Colorado, Illinois, Iowa,

Kansas, Minnesota, Missouri, Nebraska, New Mexico, and Wyoming. It operates approximately 58 million miles per year in interstate commerce, of which 7% is over Illinois highways. Pacific Intermountain Express Co. (hereafter Pacific) is a Nevada corporation and operates between points in California, Colorado, Idaho, Illinois, Indiana, Kansas, Missouri, Montana, Nevada, Oregon, Utah, Washington and Wyoming. It operates approximately 90 million miles per year, of which 3% is over Illinois highways.

Each of the plaintiffs is at present operating its trailers with what is termed the conventional or straight mud or splash guard which is recognized as legal in all the forty-eight states other than Illinois. Each of the plaintiffs, in order to operate in Illinois, will be required to equip its trailers with the contour type splash guard required by the Illinois Act, the cost of which is $30 or more per vehicle. Navajo will be required to make such installation on approximately 733 trailers, at a cost of $21,990; Ringsby, on approximately 468 trailers, at a cost of $14,040; Prucka, on approximately 150 trailers, at a cost of $4,500; Denver on approximately 750 trailers, at a cost of $22,500; Watson, on approximately 1528 trailers, at a cost of $45,840; Pacific, on approximately 1200 trailers, at a cost of $36,000. Moreover from two to four hours of labor are required to install or remove a contour splash guard. The expense incident to maintenance and replacement is heavy.

The service rendered by plaintiffs requires that they interchange trailers, and for many years this has been the practice. For example, a carrier which serves between Portland, Oregon and Denver, Colorado, will handle and originate a trailer load of perishable commodities destined for Chicago. The original carrier will move the trailer from Portland to Denver and then deliver it, without transferring the load, for movement to destination via any one of the plaintiffs herein. This interchange service constitutes a substantial proportion of the transportation business of each of the plaintiffs, ranging from 30% to 65%. For example, in the year 1956, the revenue derived by Pacific from traffic which moved through its Chicago terminal amounted to approximately $3,182,000. The revenue derived by Watson for the month of May, 1957, moving through its Chicago terminal, amounted to approximately $1,000,000, of which more than one-third was on traffic

moved into the Chicago terminal from points outside of the state of Illinois. It derived revenue in the same month from freight moving through its Peoria, Illinois, terminal of approximately $107,000, of which about one-third was from freight moving into Peoria from points outside of the state of Illinois. Other plaintiffs received comparable revenue from interchange traffic passing through Illinois.

This interchange of traffic is necessary and essential for the efficient and prompt service which plaintiffs are required to render. More than that, a considerable portion of the service required of plaintiffs could not otherwise be rendered. For instance, plaintiffs render transportation service to the United States Government, including the transportation of explosives which are required to be handled in sealed trailers which cannot be opened until delivered. This service in the main could not be rendered absent the ability of the originating carrier to interchange with other carriers. Plaintiffs also carry substantial amounts of commodities which because of their nature, such as their size or weight, or because they are perishable, cannot be physically transferred from one trailer to another without damage and delay. Again, proper service can be rendered only because plaintiffs are able to interchange trailers, carrying such shipments, with other carriers which are authorized to complete the journey to the point of the shipment's destination. More than that, many shippers and consignees specify in their bills of lading that the commodity which they ship must remain in the same trailer until it reaches its destination.

This statement, so far, is in the main a brief resumé of the factual allegations of the complaint either admitted or not disputed by defendants. It should also be noted, and this is without dispute, that each of the plaintiffs upon entering Illinois is required not only to equip a trailer owned by it so as to comply with the Illinois Act, but is also required to equip a trailer in use by it but owned by another carrier. This it has no right to do without the specific authority of the other carrier.

We were led to believe at the time of the hearing, and still believe, that all of the states, except Illinois and perhaps Oregon and Idaho, require nothing more than the conventional or straight mud flap, none of which would comply

with the Illinois Act. During oral argument the following colloquy took place between Judge Briggle and Mr. Husted, counsel for defendants:

> "Judge Briggle: In other words, the Illinois Act is for 48 states, there is no other state that would be acceptable in Illinois?
>
> Mr. Husted: No.
>
> Judge Briggle: You say Illinois would be acceptable in those states?
>
> Mr. Husted: Yes.
>
> Judge Briggle: But no one of those is acceptable in Illinois, therefore, Illinois' act must be complied with by 48 states?
>
> Mr. Husted: That is true."

Later, counsel modified his answers by stating that the splash guard provided by Oregon and Idaho would be acceptable in Illinois. In the written brief subsequently filed, counsel brands as untrue "plaintiffs' contention that 'splash guards which are permitted in all other states are illegal in Illinois' and that 'the Attorney General admits this as to 45 states.'" The argument proceeds:

> "As above explained, almost all of the states which have anti-splash statutes require a cover or fender and certain ones permit the old style flap as an alternative or stop-gap measure. *The fenders required by these other states are legal in Illinois.* [Italics ours.]

As we understand this statement, counsel for defendants now claim that splash guards or fenders required by other states would be recognized by Illinois. It is difficult to believe that such a concession was intended. If so, there is no reason for this law suit in which plaintiffs seek to invalidate the Illinois Act which prevents them for entering Illinois equipped with mud flaps in accordance with the laws of the states of their respective domiciles.

It was also conclusively shown that the contour mud flap possesses no advantage over the conventional or straight mud flap previously required in Illinois and presently required in most of the states. Counsel for defendants in oral argument substantially so conceded, as evidenced by the following statement. "There was a wealth

of testimony to the effect that in their opinion the old style were better and were preferable and were cheaper and were longer lived, but nobody said that it bore no relation, no reasonable relation to the end sought." In connection with this admission it should be noted that counsel consistently throughout the hearing took the position that such comparison was irrelevant, objected to the admission of such testimony and for the same reason, we assume, offered no testimony on this point in rebuttal.

The intervenor, Arkansas-Best Freight System, Inc., is an Arkansas corporation and is engaged in the transportation of property by motor vehicle as a common carrier in interstate commerce between points in the states of Arkansas, Kansas, Missouri, Illinois, Louisiana and Texas, pursuant to a certificate of public convenience and necessity. The greater part of its operations over Illinois highways involves the transportation of property moving in interstate commerce.

On December 13, 1957, the Arkansas Public Service Commission entered an order which requires that trailers operating on Arkansas highways be equipped with "a perpendicular, flexible type mud guard hanging at a right angle from the trailer." Since the Illinois Act requires that the splash guard contour the wheel, it is evident that a single splash guard cannot satisfy the requirements of both states. It is, therefore, hardly open to doubt that use by intervenor of a splash guard which meets the requirements of the state of its domiciles would be unlawful and not permitted in the state of Illinois. Conversely, a trailer equipped with a mud flap in accordance with the Illinois requirement would not be permitted in the state of Arkansas and its use in that state would be unlawful. In fact, a driver-employe of intervenor engaged in the operation of a trailer upon a public highway in Illinois was, on January 2, 1957, arrested and charged with a violation of the Illinois Act. A hearing on the charge was continued, pending the result of this litigation.

Intervenor's Director of Labor and Safety testified as to the situation resulting from the conflict in the requirements imposed by the two states. In response to the suggestion that a trailer at the state line might be stopped and equipped to comply with the Illinois Act, the witness stated:

"• • • that would entail quite a maintenance program and a terrific additional maintenance cost because we do all our maintenance work, all our major maintenance work at our Little Rock shop, and other points such as St. Louis and Fort Smith are merely emergency service points."

The witness also testified as to the problem presented in complying with the Illinois Act, with trailers received from other carriers in exchange and with trailers loaded with explosives:

"• • • we haul explosives from the Red River Arsenal in Texarkana, and there is one specific carrier I can think of now, Red Ball Motor Freight, who operates primarily in Louisiana and Texas. They also haul a lot of explosives out of there, and when that arsenal calls our Texarkana terminal manager to come out and get 'x' number of loads, they do not take in regard whose trailer it is, but they merely load so many trailers going in our direction, and we go out there and pull those trailers. If they were to load those on a Red Ball Trailer, and Red Ball, being a Texas domiciled carrier, we would be all right with his mud flap until we got to the Illinois line. Then we would have to stop there and add the contour mudflap, operate it east of St. Louis, and when it returns to St. Louis, we would have to remove it and the contour mud flap, having to be welded, we would have quite a problem welding them on and several days later going in there and attempting to take them off.

"Further, under the interchange carrier agreement, we would have to contact Red Ball Motor Freight in Dallas, Texas, and receive their authority to add this contour mudflap to their pieces of equipment.

• • •

"Q. With a load of explosives, would you be in a position to weld the contour mudflap on the trailer?

A. Definitely not.

Q. Why?

A. Because of the danger of explosion, fire, and things of that nature."

A witness for Watson described the problem presented by an attempt to comply with the Illinois Act, as follows:

> "Any time you stop a trailer to do anything to it, it disrupts the service. Motor carriers exist on a fast, efficient transportation service and, if we were required to stop a trailer, assuming we had permission to install the mudflap on a foreign trailer, that is, a connecting line trailer, if we were required to stop that trailer at some state line or some garage to install a contour mudflap, there is bound to be delay which restricts the kind and type of motor carrier service we have been providing for years."

It would unduly prolong this opinion to quote further from the testimony. It is sufficient to state that the testimony of the witnesses just quoted finds abundant corroboration in the record. In fact, the seriousness of the problem to interstate motor carriers is not challenged by defendants. Rather, the state takes the position that it is not concerned with the problem or the difficulty with which such carriers are presented. It is significant that during the hearing, including the argument, no practical or reasonable suggestion was made as to how the Act could be complied with.

Congress has not seen fit to exercise its constitutional power to legislate relative to splash guards on trailers engaged in interstate commerce. The importance of uniformity would seem to suggest the desirability of such legislation. However, in its absence the question arises as to what protection, if any, is afforded by the commerce clause of the Constitution. Defendants do not and could not dispute but that enforcement of the Act would impose some burden upon interstate commerce. Their position, however, is, as we understand, that such burden is immaterial in view of the fact that the Act is non-discriminatory as between intra- and interstate commerce, and further, that the Act is a reasonable exercise by the legislature of its police power, inasmuch as its purpose is to provide for the safety of persons and motor vehicles using the highways. Plaintiffs contend that the burden imposed upon commerce is of such magnitude as to entitle them to protection under the commerce clause, that it is greater than can be justified under the police power and without merit as a safety measure.

We gather from a study of the cases that the conflicting interest between the federal and state governments must be resolved in accordance with the facts of each case. It is our firm conviction, under the proof, that enforcement of the Act would impose not merely some but a tremendous burden upon interstate commerce. Particularly is this so as to commerce between the states of Illinois and Arkansas; in fact, commerce between those two states would be stymied to the extent that its future existence would be imperiled, if not obliterated. More than that, the same insurmountable burden would be imposed upon commerce between Illinois and any other state or states which might see fit to do as Arkansas has done, that is, exclude trailers equipped with the contour splash guard required by the Act. Furthermore, we are convinced that little, if anything, can be claimed for the Act as a safety measure. We have already noted the concession that the weight of the evidence is to the effect that the contour possesses no advantages over the straight or conventional mud flap. While there is some proof of advantages possessed by the contour flap, there is also proof of its disadvantages. In fact, there is rather convincing testimony that use of the contour flap creates hazards previously unknown to those using the highways.

Plaintiffs, in support of the contention that the Act should be held unconstitutional, rely upon *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761, and *Morgan* v. *Virginia*, 328 U. S. 373. Defendants, in opposition thereto, rely upon *South Carolina State Highway Department, et al.* v. *Barnwell Brothers, Inc., et al.*, 303 U. S. 177, and *Maurer, et al.* v. *Hamilton*, 309 U. S. 598.

In the *Southern Pacific* case, the Court held unconstitutional the Arizona Train Limit Law which made unlawful operation within the state of a passenger train of more than fourteen cars or a freight train of more than seventy cars. In doing so it reversed the Supreme Court of Arizona which had sustained the Act as a safety measure within the police power of the legislature to enact. It can hardly be doubted but that the reasoning of the Court in Southern Pacific, if applicable, strongly supports plaintiffs' contention in the instant case. Defendants, however, deny its applicability on the ground that the statute there under consideration related to transportation by railroad, while in the instant case it relates to transportation by motor carrier, relying upon the *Barnwell* and *Hamilton* cases.

In these cases the Supreme Court sustained the validity of state legislation regulating motor traffic within the state. In *Barnwell*, the legislation prohibited the use on the state highways of South Carolina of motor trucks whose width exceeded 90" and whose weight included a load in excess of 2000#. In *Hamilton*, the Court sustained the validity of a Pennsylvania statute which prohibited the operation on the highways of the state of any vehicle carrying any other vehicle "above the cab of the carrier vehicle or over the head of the operator of such carrier vehicle." Undoubtedly, Barnwell and Hamilton stand for the proposition that a state in the exercise of its police power has greater latitude in the regulation of motor vehicles than it does of railroads. This is because the former generally is concerned with matters of local interest while the latter more often is concerned with the national interest.

In *Barnwell*, the Court stated (page 185):

> "• • • it has been recognized that there are matters of local concern, the regulation of which unavoidably involves some regulation of interstate commerce but which, because of their local character and their number and diversity, may never be fully dealt with by Congress. Notwithstanding the commerce clause, such regulation in the absence of Congressional action has for the most part been left to the states by the decisions of this Court, subject to the other applicable constitutional restraints."

Further, the Court stated (page 187):

> "Few subjects of state regulation are so peculiarly of local concern as is the use of state highways. There are few, local regulation of which is so inseparable from a substantial effect on interstate commerce. Unlike the railroads, local highways are built, owned and maintained by the state or its municipal subdivisions. The state has a primary and immediate concern in their safe and economical administration. The present regulations, or any others of like purpose, if they are to accomplish their end, must be applied alike to interstate and intrastate traffic both moving in large volume over the highways. The fact that they affect alike shippers in interstate and intrastate commerce in large numbers within as well as without the state is a safeguard against their abuse."

Thus, the Court treated the weight and width requirements as of local concern even though they affected interstate commerce. It was on this premise that the Court held the Act constitutional and stated that the inquiry under the commerce clause was whether the state legislature in adopting the regulations under attack (page 190) "has acted within its province, and whether the means of regulation chosen are reasonably adapted to the end sought."

The *Hamilton* case also treated the statute under attack as relating to a matter of local concern. The Court pointed out (page 605):

> "The width, grades, curves, weight-bearing capacity, surfacing and overhead obstructions of the highways differ widely in the forty-eight different states and in different sections of each state. There are like variations with respect to congestion of traffic. State regulation, developed over a period of years, has been directed to the safe and convenient use of the highways and their conservation with reference to varying local needs and conditions."

This appraisement of Barnwell and Hamilton appears to have been recognized by the Supreme Court in the later cases of *Southern Pacific Co.* and *Morgan*. For instance, in the *Southern Pacific* case (page 767) the Court stated:

> "When the regulation of matters of local concern is local in character and effect, and its impact on the national commerce does not seriously interfere with its operation, and the consequent incentive to deal with them nationally is slight, such regulation has been generally held to be within state authority." [Citing the *Barnwell* and *Hamilton* cases.]

In contrast, the Court on the same page stated:

> "But ever since *Gibbons* v. *Ogden*, 9 Wheat. 1, the states have not been deemed to have authority to impede substantially the free flow of commerce from state to state, or to regulate those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority."

The Court also stated (page 781):

> "More recently in *Kelly* v. *Washington*, 302 U. S. 1, 15, we have pointed out that when a state goes beyond

safety measures which are permissible because only local in their effect upon interstate commerce, and 'attempts to impose particular standards as to structure, design, equipment and operation [of vessels plying interstate] which in the judgment of its authorities may be desirable but pass beyond what is plainly essential to safety and seaworthiness, the State will encounter the principle that such requirements, if imposed at all, must be through the action of Congress which can establish a uniform rule. Whether the State in a particular matter goes too far must be left to be determined when the precise question arises.'"

The Court further stated (page 779):

"The principle that, without controlling Congressional action, a state may not regulate interstate commerce so as substantially to affect its flow or deprive it of needed uniformity in its regulation is not to be avoided by 'simply invoking the convenient apologetics of the police power,' *Kansas City Southern R. Co.* v. *Kaw Valley District*, 233 U. S. 75, 79 • • •."

This distinction drawn between regulations concerned with local matters and those involving the national interest is emphasized in the *Morgan* case, wherein the Court held unconstitutional an Act of Virginia which required passenger motor vehicle carriers, both interstate and intrastate, to separate without discrimination the white and colored passengers in their motor buses. First the Court discussed the test to be applied in determining whether a state statute is invalid as imposing an undue burden upon commerce. The Court stated (page 377):

"The precise degre of a permissible restriction on state power cannot be fixed generally or indeed not even for one kind of state legislation, such as taxation or health or safety. There is a recognized abstract principle, however, that may be taken as a postulate for testing whether particular state legislation in the absence of action by Congress is beyond state power. This is that the state legislation is invalid if it unduly burdens that commerce in matters where uniformity is necessary—necessary in the constitutional sense of useful in accomplishing a permitted purpose. Where uniformity is essential for the functioning of commerce,

a state may not interpose its local regulation. Too true it is that the principle lacks in precision. Although the quality of such a principle is abstract, its application to the facts of a situation created by the attempted enforcement of a statute brings about a specific determination as to whether or not the statute in question is a burden on commerce. Within the broad limits of the principle, the cases turn on their own facts."

The Court, commencing on page 378, cites many cases in support of three propositions:

(1) "In the field of transportation, there has been a series of decisions which hold that where Congress has not acted and although the state statute affects interstate commerce, a state may validly enact legislation which has predominantly only a local influence on the course of commerce. [Citing *Barnwell* and *Hamilton.*]"

(2) "It is equally well settled that, even where Congress has not acted, state legislation or a final court order is invalid which materially affects interstate commerce. [Citing *Southern Pacific.*]"

"(3) "Because the Constitution puts the ultimate power to regulate commerce in Congress, rather than the states, the degree of state legislation's interference with that commerce may be weighed by federal courts to determine whether the burden makes the statute unconstitutional. [Again citing *Southern Pacific.*]"

In appraising the effect which the statute had on interstate commerce, the Court stated (page 381):

"To appraise the weight of the burden of the Virginia statute on interstate commerce, related statutes of other states are important to show whether there are cumulative effects which may make local regulation impracticable."

In holding the Act unconstitutional, the Court further stated (page 386):

"As there is no federal act dealing with the separation of races in interstate transportation, we must decide the validity of this Virginia statute on the challenge that it interferes with commerce, as a matter of

balance between the exercise of the local police power and the need for national uniformity in the regulations for interstate travel."

Thus, the distinction between the two lines of cases does not arise, as defendants contend, from the fact that the Court, in *Barnwell* and *Hamilton*, was concerned with transportation by motor vehicle and in *Southern Pacific* with transportation by railroad. The distinction lies in the fact that in the two former cases the provisions under consideration related to matters of local concern while in the latter case the provision related to a matter of national concern. Defendants apparently recognize this distinction by arguing that the Act under attack is of local concern, on the basis that Illinois is a "wet-weather" state, having a large amount of wet, rainy and snowy weather, causing its roads to be wet and dirty for a substantial portion of each year. Defendants offered in evidence a report of the United States Weather Bureau showing the average annual precipitation at different points in the state. No similar proof, or proof of any kind, was offered as to the weather and highway conditions in other states. The mere fact that large amounts of rain and snow fall upon the highways of Illinois furnishes no support to the argument that the requirement as to splash guards is a matter of local concern in the absence of a showing that weather conditions affecting highways is different in other states, particularly those surrounding Illinois. We know, however, from experience common to all who travel the highways of this country that the situation under discussion is the same or similar in many states, and perhaps all. Particularly is that true in states surrounding Illinois and others of the midwest.

Defendants take no note of the burden which the Act places upon commerce, which perhaps is consistent with the theory that it relates to a matter of local concern and the burden, therefore, is immaterial. We reject the premise upon which this theory is predicated. The burden is material because enforcement directly relates to the national interest. That burden, in our judgment, will be tremendous. In fact, enforcement is likely to produce a demoralizing effect upon the operations conducted by plaintiffs, the intervenor and others similarly engaged. The certificate of public convenience and necessity issued to plaintiffs and other motor carriers by the Interstate Com-

merce Commission requires that they "shall render reasonably continuous and adequate service to the public in pursuance of the authority herein granted, and that failure to do so shall constitute sufficient grounds for suspension, change or revocation of this certificate." It is not discernible to us how plaintiffs can discharge their responsibilities under this certificate and at the same time comply with the requirements of the Illinois Act. It is hardly open to question but that compliance will result in intolerable delay in transportation and the expenditure of large sums of money for equipment and maintenance.

We are not impressed with defendant's argument that the Act should be sustained on the basis that the legislature acted within its police power and that the means of regulation chosen by it are reasonably adapted to the end sought. We assume that the contour splash guard will serve some beneficial purpose in eliminating splash. The same could be said for a piece of cardboard or other object hung behind the rear wheels of a trailer. As already shown, the conventional or straight mud flap previously recognized in Illinois and presently recognized by most and perhaps all of the other states served the purpose of preventing splash as well as does the contour guard. The result of the requirements of the Act is to place a great burden upon commerce, without any compensating benefit to the state. Under the circumstances, it cannot be held that the requirements of the Act are reasonably adapted to the end sought. In any event, a challenge that the Act interferes with commerce requires this Court to decide its validity "as a matter of balance between the exercise of the local police power and the need for national uniformity in the regulations for interstate travel." *Morgan* v. *Virginia*, 328 U. S. 373, 386. In our judgment, the burden which the Act casts upon commerce far outweighs any benefit derived by the state.

It is, therefore, our view and we so hold that the Act is unconstitutional and void, as violative of Article I, Section 8, of the Constitution of the United States, and that plaintiffs are entitled to a decree permanently enjoining its enforcement.

Indorsed

Filed Feb. 26, 1958.

G. W. Schwaner, Clerk.

APPENDIX II

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS
SOUTHERN DIVISION

Navajo Freight Lines, Inc., a New Mexico Corporation, et al. vs. Joseph D. Bibb, Director of the Department of Public Safety of the State of Illinois, et al.	Civil Action No. 2438 In Chancery

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. FINDINGS OF FACT

1. That each of the plaintiffs operates in interstate commerce pursuant to certificates of public convenience and necessity issued by the Interstate Commerce Commission.

2. That pursuant to said certificates, each of the plaintiffs operates into and through the State of Illinois.

3. That intervener Arkansas-Best Freight System, Inc. operates in interstate commerce pursuant to a certificate of public convenience and necessity issued by the Interstate Commerce Commission.

4. That pursuant to said authority, Arkansas-Best Freight System, Inc. operates between points in Arkansas and Illinois, as well as between Arkansas and other States through Illinois.

5. That intervenor Arkansas-Best Freight System, Inc. also operates in intrastate commerce in the State of Arkansas, pursuant to authority granted by the Arkansas Public Service Commission, and is subject to the rules and regulations of said Commission.

6. That Section 121.02 of the Uniform Act Regulating Traffic on Highways, being Section 218b of Chapter 95½, Illinois Revised Statutes, as amended, by Act approved

July 8, 1957, requires that trailers of plaintiffs and intervener be equipped with a contour splash guard meeting certain described specifications and contouring the wheel within six (6) inches of the tire.

7. That compliance with said Act for vehicles used exclusively in interstate commerce by plaintiffs and intervener would cost each of them in excess of Three Thousand ($3,000.00) Dollars.

8. That on December 13, 1957 the Arkansas Public Service Commission issued an order requiring that all vehicles using Arkansas highways be equipped with the straight splash guard hanging perpendicular to the trailer and parallel to the rear axle.

9. That it is impossible for a splash guard to comply with the requirements of the Illinois Splash Guard Act and the order of the Arkansas Public Service Commission.

10. That a vehicle equipped with the splash guard required in Illinois cannot be operated legally in Arkansas, and a vehicle equipped with the splash guard required in Arkansas cannot be operated legally in Illinois.

11. That the splash guards permitted or required in 45 States are illegal in the State of Illinois by virtue of the Illinois Splash Guard Act.

12. That by virtue of the conflicting requirements of Illinois and Arkansas, the free flow of commerce by motor carriers is obstructed because equipment legal in one State is illegal in the other.

13. That each of the plaintiffs and intervener interchanges trailers with carriers throughout the United States in accordance with common and accepted practice of motor carrier in interstate commerce in order to provide through trailer service from origin to destination in compliance with the certificate of public convenience and necessity issued to them by the Interstate Commerce Commission.

14. That the trailers of each of the plaintiffs may reasonably be expected to traverse each of the 48 States by virtue of the interlining practices of plaintiffs and intervener with other carriers.

15. That the trailers of each of the plaintiffs traverse upon highways of the State of Arkansas.

16. That because trailers equipped in accordance with Illinois splash guard requirements cannot be operated legally in Arkansas, and trailers equipped in accordance with Arkansas splash guard requirements cannot be operated legally in Illinois, the interlining operations of plaintiffs will be obstructed.

17. That all carriers who operate into or through Illinois from any point in the United States will be required to equip their vehicles in accordance with the Illinois Splash Guard statute.

18. That all carriers whose equipment is sent into or through Illinois by virtue of interlining will be required to equip their vehicles in accordance with the Illinois Splash Guard statute.

19. That since it is impossible for a carrier operating in interstate commerce to determine which of its equipment will be used in a particular area, or on a particular day, or days, carriers operating into or through Illinois, or whose equipment may operate into Illinois through interlining will be required to equip all of their trailers in accordance with the requirements of the Illinois Splash Guard statute.

20. That because plaintiffs who operate into and through Illinois have no way of compelling carriers with whom they interline to equip their trailers in accordance with the Illinois splash guard statute, they will be forced to cease interlining trailers destined to or through Illinois with carriers who do not comply with Illinois law.

21. That it would be impossible in most cases, and impracticable in others, for plaintiffs to equip trailers obtained by interlining with the splash guard required by Illinois.

22. That the practice of interlining or interchanging trailers is an important means by which plaintiffs serve the shipping public in accordance with certificates of public convenience and necessity issued to them by the Interstate Commerce Commission, and is vital to the very existence of plaintiffs.

23. That the contour splash guard required by Section 121.02 of the Uniform Act Regulating Traffic on Highways, being Section 218b of Chapter 95½, Illinois Revised Statutes, as amended, by Act approved July 8, 1957, is not

intended to nor does it deal with a safety need or problem peculiar to the State of Illinois.

24. That the contour splash guard required in Illinois does not reduce the spray and splash caused by motor vehicles on highways any more effectively than the conventional or straight splash guard permitted in forty-five (45) States, if as well.

25. That because the contour splash guard is difficult to properly affix to the trailer, and because in its position it is peculiarly liable to receive many blows and be subject to vibration, it is particularly liable to come off while the vehicle is in operation, presenting a hazard to oncoming traffic, and creating a difficult and costly maintenance problem for carriers.

26. That since because of the Illinois Contour Splash Guard Act vehicles will be traveling with said guards in all forty-eight (48) States, the danger and safety hazards created by said guard will hinder and obstruct commerce on highways throughout the United States.

27. That because of the shrouding effect of the contour splash guard heat dissipation from air flow around the brake drum is reduced, creating brake fade from overheated brakes.

28. That brake fade increases the distance needed for a vehicle to stop, since the contour guard will be used throughout the United States, a new hazard will be added to highway travel in interstate commerce all over the United States.

29. That plaintiffs are seeking by this action to have the contour splash guard state of the State of Illinois declared invalid and unconstitutional as an undue and unreasonble burden and obstruction to the free flow of interstate commerce.

30. That said Illinois Contour Splash Guard Act, while placing a substantial burden and obstruction upon the free flow of interstate commerce, does not contribute to safety in Illinois, and in fact introduces new dangers and hazards to highway travel in Illinois and throughout the United States not hitherto in existence.

II. CONCLUSIONS OF LAW.

1. That the matter in controversy exceeds the sum of Three Thousand ($3,000.00) Dollars for each plaintiff and intervener, exclusive of interest and costs and arises under the Constitution and laws of the United States.

2. That this Court has jurisdiction of the parties and the subject matter of this action.

3. That enforcement of Section 121.02 of the Uniform Act Regulating Traffic on Highways, being Section 218b of Chapter 95½, Illinois Revised Statutes, as amended, by Act approved July 8, 1957 requiring that plaintiffs' and intervener's trailers be equipped with contour splash guards, and the Order of the Arkansas Public Service Commission issued December 13, 1957, requiring that plaintiffs' and intervener's trailers be equipped with the straight or conventional splash guards will render it impossible for plaintiffs and intervener to operate the same equipment in both States, thereby obstructing the free flow of commerce in direct violation of the Commerce Clause, Article I, Section 8 of the United States Constitution, and said Illinois Act is, therefore, unconstitutional and invalid.

4. That Section 121.02 of the Uniform Act Regulating Traffic on Highways, being Section 218b of Chapter 95½, Illinois Revised Statutes, as amended, by Act approved July 8, 1957, unduly and unreasonably burdens and obstructs the free flow of commerce between the States by making splash guards which are legal in forty-five (45) States illegal in Illinois, and is, therefore, unconstitutional and invalid as a direct violation of the Commerce Clause, Article I, Section 8 of the United States Constitution.

5. That plaintiffs and intervener are entitled to a permanent injunction enjoining and restraining the defendants, and each of them, their successors in office and their agents, attorneys and employes, and each and every one of them, from enforcing or instituting proceedings to enforce Section 121.02 of the Uniform Act Regulating Traffic on Highways, being Section 218b of Chapter 95½, Illinois Revised Statutes, as amended, by Act approved July 8, 1957 by reason of the fact that said Act is an unreasonable and undue burden and obstruction to the free flow of interstate

commerce in violation of the Commerce Clause, Article I, Section 8 of the United States Constitution.

ENTER:

/s/ J. EARL MAJOR
/s/ CHAS. G. BRIGGLE
/s/ FREDERICK O. MERCER

Dated: Feb. 26, 1958.
Indorsed Filed
Feb. 26, 1958
G. W. Schwaner, Clerk

APPENDIX III.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS
SOUTHERN DIVISION

Navajo Freight Lines, Inc.,
a New Mexico corporation,
Ringsby Truck Lines, Inc.
A Nebraska corporation,
Prucka Transportation, Inc.,
A Nebraska corporation,
Denver Chicago Trucking Co., Inc.,
A Nebraska corporation, and
Pacific Intermountain Express Co.,
a Nevada corporation,
Plaintiffs,

and

Arkansas-Best Freight System, Inc.,
An Arkansas corporation,
Intervenor,

vs.

Joseph D. Bibb, Director of the Department of Public Safety of the State of Illinois

and

William H. Morris, Superintendent of the Division of State Highway Police, Department of Public Safety of the State of Illinois,
Defendants.

Civil Action
No. 2438
For Declaratory
Judgment
and Injunctive
Relief

ORDER.

This cause coming on to be heard on the complaint of plaintiffs, Navajo Freight Lines, Inc., Ringsby Truck Lines, Inc., Prucka Transportation, Inc., Denver Chicago Trucking Co., Inc., Watson Bros. Transportation Co., Inc. and Pacific Intermountain Express Co., and the intervening petition and complaint of intervenor, Arkansas-Best Freight System, Inc., for a declaratory judgment that Section 121.02 of the Uniform Act Regulating Traffic on High-

ways, being Sec. 218b of Chap. 95½ (Ill. Rev. Stat.), as amended by Act approved July 8, 1957, is unconstitutional and void and for a permanent injunction enjoining defendants from enforcing or instituting proceedings against plaintiffs under the said Act, the Court having jurisdiction of the parties and the subject matter, being fully advised in the premises having heard the evidence and the arguments of all the parties hereto in open court, having considered the briefs submitted by the parties, and having filed its findings of fact, conclusions of law and opinion on February 26, 1958 holding Section 121.02 of the Uniform Act Regulating Traffic on Highways, being Section 228b of Chapter 95½, Illinois Revised Statutes, as amended by Act approved July 8, 1957 to be unconstitutional and void, as violative of Article I, Section 8, of the Constitution of the United States.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the defendants, Joseph D. Bibb, Director of the Department of Public Safety of the State of Illinois, and William H. Morris, Superintendent of the Division of State Highway Police, Department of Public Safety of the State of Illinois, and each of them, their successors in office and their agents, servants, attorneys and employees be and they are hereby permanently restrained and enjoined from enforcing or instituting any proceedings of any kind or nature whatsoever against the plaintiffs or intervenor herein for violations of Section 121.02 of the Uniform Act Regulating Traffic on Highways, being Section 218b of Chapter 95½, Illinois Revised Statutes, as amended, by Act approved July 8, 1957.

ENTER:

/s/ CHAS. G. BRIGGLE

/s/ FREDERICK O. MERCER

Dated: March 10th, 1958

Indorsed Filed

Mar. 19, 1958

G. W. Schwaner, Clerk

APPENDIX IV.

People v. Warren, 11 Ill. 2d 420.

Mr. JUSTICE BRISTOW delivered the opinion of the court:

Cecil Warren, plaintiff in error, was charged with and fined $50 for violating the provisions of section 121.02 of the Uniform Act Regulating Traffic on Highways. This section was amended July 15, 1955. (Ill. Rev. Stat. 1955, chap. 95½, par. 218b.) He appeals directly to this court, and we have jurisdiction because the sole question presented is the constitutionality of the section which reads as follows:

It is unlawful for any person to operate any new motor vehicle of the second division which is purchased on and after September 1, 1955, or any motor vehicle of the second division the splash guards of which have been replaced on and after September 1, 1955, which replacement shall be necessary when present splash guards are unable to prevent the splashing of mud or water upon the windshield of other motor vehicles, upon the highways of this State outside the corporate limits of a city, village or incorporated town, unless such vehicle is equipped with rear fender splash guards which shall comply with the specifications as hereinafter provided and such splash guards shall be so attached as to prevent the splashing of mud or water upon the windshield of other motor vehicles; provided, that on and after January 1, 1957, this amendatory Act of 1955 shall apply to all motor vehicles of the second division.

The rear fender splash guards shall contour the wheel in such manner that the relationship of the inside surface of any such splash guard to the tread surface of the tire or wheel shall be relatively parallel, both laterally and across the wheel, at least throughout the top 90 degrees of the rear 180 degrees of the wheel surface and the downward extension of the curved surface shall extend to a length which shall end not more than ten inches from the ground.

Such splash guards shall be wide enough to cover the full trend [*sic*] or treads of the tires being protected and shall be installed close enough to the tread surface of the tire or wheel as to control the side-throw or wash of the bulk of the thrown road surface material and keep such

bulk within a tangent not to exceed 15 degrees measured from a base line formed by the top height of the wheel.

Such splash guards may be constructed of a flexible material, but shall be attached in such a manner that, regardless of movement, either in such splash guards or the vehicle, such splash guards will retain their general parallel relationship to the tread surface of the tire or wheel under all ordinary operating conditions.

This Section shall not apply to motor vehicles whose construction does not require such splash guards, nor to motor vehicles in transit and capable only of using temporary splash guards approved by the Illinois State Highway Police.

The validity of this section is challenged on grounds which we shall hereinafter consider separately. The motor vehicle in question is one of the second division—vehicles designed and used for pulling or carrying freight and also vehicles or motor cars which are designed and used for carrying more than seven persons. (Ill. Rev. Stat. 1955, chap. 95½, par. 99.) No controverted fact questions are involved.

Every presumption is in favor of the validity of a statute enacted under the police power. (*Gadlin* v. *Auditor of Public Accounts*, 414 Ill. 89, 95; *Zelney* v. *Murphy*, 387 Ill. 492, 499; *Thillens, Inc.* v. *Hodge*, 2 Ill. 2d 45, 57.) The only limitations upon the legislature in the exercise of its police power is that the statute must reasonably tend to correct some evil or promote some interest of the State and not violate some positive mandate of the constitution. (*Clarke* v. *Storchak*, 384 Ill. 564, 579; *People ex rel. Christiansen* v. *Connell*, 2 Ill. 2d 332, 344.) The General Assembly has a wide discretion in the enactment of laws for the protection of the public health, safety and morals or the promotion of the general welfare and such statutes are valid when they apply accordingly and uniformly to all persons similarly situated. (*City of Chicago* v. *Rhine*, 363 Ill. 619, 624; *Weksler* v. *Collins*, 317 Ill. 132, 138.) In the exercise of its inherent police power the legislature may enact laws regulating, restraining or prohibiting anything harmful to the welfare of the people, even though such regulation, restraint or prohibition interferes with the liberty or property of an individual. *Bode* v. *Barrett*, 412 Ill. 204, 225; *City of Evanston* v. *Wazan*, 364 Ill. 198, 202;

Fenske Bros., Inc. v. *Upholsterers Union*, 358 Ill. 239, 251; *People* v. *Anderson*, 355 Ill. 289, 296.

No person has the right to conduct a business upon the public highways or to devote them to private gain except as the State, by acquiescence or by law, may permit it. (*Hayes Freight Lines, Inc.* v. *Castle*, 2 Ill. 2d 58, 64; *Bode* v. *Barrett*, 412 Ill. 204, 219; *Weksler* v. *Collins*, 317 Ill. 132, 139, 142.) If the means be appropriate, the ultimate aim of safeguarding life, health and property upon the highways is clearly within the power of the General Assembly. The legislature may properly enact such a law even though it may interfere with the property of an individual; the overriding consideration being that the safety of the people is paramount to the unfettered use by an individual of his property. *Bode* v. *Barrett*, 412 Ill. 204, 225.

The measure of the reasonableness of a police regulation is not necessarily what is best but what is fairly appropriate to the purpose of the act under all circumstances. (*Keig Stevens Baking Co.* v. *City of Savanna*, 380 Ill. 303, 309; *Weksler* v. *Collins*, 317 Ill. 132, 141.) The rapid progress of science and invention has created and is constantly creating new needs for regulation by law. Powerful machines, capable of inflicting death, bodily injury and destruction of property, traverse the arteries of traffic at speeds which, if unregulated, would add to the already frightening total of highway casualties. Chapter 95½, of Illinois Revised Statutes, 1955, contains the various legislative acts making up the motor vehicle law. No reasonable person would question not only the right but the absolute duty of the legislature to imposed these regulations upon those who use the streets and roads of the State. All these regulations, including even prohibitions which stand in substantial relationship to the public welfare, must be presumed by the courts to be necessary for the purpose of protecting public health, safety and morals, and must be sustained under the police power of the State.

In the present case plaintiff in error does not question the right of the legislature to provide for and regulate the use of splash guards on motor vehicles. He poses only the question whether the legislature has properly exercised its power by the adoption of the section of the statute under attack in its present form. Tested by the rules of constitutional interpretation alluded to above, we find no merit in

the contention that the provisions of that section are unreasonable, arbitrary and capricious. The splashing of water or mud upon the windshields of other vehicles on the road is an evil which the legislature rightfully aims to correct. We can give no weight to the contention of the plaintiff in error that the "mud flaps" which were required upon all trucks under the 1951 statute are to be preferred as more simple and inexpensive. It is within the power of the legislature to solve safety problems, by whatever means it deems best, so long as such means reasonably tend to correct the evil. Since this police regulation is fairly appropriate to the expressed purpose of the statute, it is immaterial so far as the court is concerned, whether it is the best possible means or is inferior to the 1951 enactment which it supplants.

The claim that this statute is "impossible of construction" and "requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at their meaning," is equally without merit. The requirements and specifications for the splash guards are intelligible and ascertainable and the standards for their implementation are fully spelled out. The record shows that, without any difficulty, there can be compliance.

The complaint that this act delegate legislative authority to administrative officials, and is therefore invalid, is not substantiated. It is necessary to distinguish between the delegation of true legislative power and the delegation to a subordinate of authority to execute the law. (*Lydy, Inc.* v. *City of Chicago*, 356 Ill. 230, 235.) As we said, in *City of Evanston* v. *Wazau*, 364 Ill. 198, at page 204: "It is true that while a legislative body cannot divest itself of its proper function of determining what the law shall be, it may nevertheless authorize others to do those things which it might properly, but cannot understandingly or advantageously do itself. • • • This doctrine is sound and has been adhered to for many years, for the obvious reason that government could not be carried on if nothing were left to the judgment and discretion of administrative officers. • • • A clear distinction exists, however, between the power to legislate—to grant the permit under certain specified conditions—and the power to administer or regulate its exercise, once granted. The true distinction is between a delegation of power to make the laws, which in-

volves a discretion as to what the law shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no objection can be made. 1 Sutherland on Stat. Const. 2d ed. p. 148."

The constitution does not require the General Assembly to establish all-embracing absolute criteria whereby every detail and circumstance necessary in the enforcement of the law is anticipated; intelligible standards to guide the agency charged with the enforcement are sufficient. *Hayes Freight Lines, Inc.* v. *Castle*, 2 Ill. 2d 58, 65.

The act in question delegates no power to make the law; it merely imposes upon the Illinois State Highway Police the duty and authority of approving temporary splash guards for motor vehicles in transit. The term "vehicles in transit" is defined by statute. It means those towed or carried. (Ill. Rev. Stat. 1955, chap. 95½, par. 19). The General Assembly is not required to concern itself with the myriad of transitory circumstances to be encountered. It may confer reasonable discretion upon the proper agency as to the execution of the law. The ministerial duty of approving temporary splash guards for "in transit" trucks is properly delegated to the officials on the spot. The legislature could hardly do this, so it must fall in that twilight area where some discretion is left to the police.

Complaint is made that the statute is discriminatory and that there is no rational basis for the classification between those vehicles which require splash guards and those which do not. A valid and justifiable classification must be based on a real and substantial difference having a rational relation to the subject of the particular legislation. (*Hansen* v. *Raleigh*, 391 Ill. 536, 544; *People ex rel Heydenreich* v. *Lyons*, 374 Ill. 557, 564; *Crews* v. *Lundquist*, 361 Ill. 193, 197; *Lueth* v. *Goodknecht*, 345 Ill. 197, 199.) The legislature is vested with a broad discretion in making classifications in the interest of the public safety, and the question of classification is primarily legislative and only becomes judicial when legislative action is clearly unreasonable. (*Hayes Freight Lines, Inc.* v. *Castle*, 2 Ill. 2d 58, 64; *Weksler* v. *Collins*, 317 Ill. 132, 139; *Heartt* v. *Village of Downers Grove*, 278, Ill. 92, 95.) The test of equal protection of the laws is whether the legislation in question operates equally on all persons in the class to which it applies and not whether that

class is treated the same as another class. (*Hansen* v. *Raleigh*, 391 Ill. 536, 544; *Smith* v. *Murphy*, 384 Ill. 34, 40; *Murphy* v. *Cuesta, Rey & Co.*, 381 Ill. 162, 165.) As to classification and subclassification within an act, it must clearly appear that the judgment of the legislature is erroneous or that the discretion vested in the legislature has been arbitrarily abused and the person who asserts that a classification in a police regulation is arbitrary or indiscreet has the burden of proof that it does not rest on any reasonable basis. (*Bode* v. *Barrett*, 412 Ill. 204, 227; *Eastman* v. *Yellow Cab Co.*, 173 F. 2d 874, 881.) In this the defendant has failed.

This classification is reasonable and is based on substantial differences which have a rational relation to the subject matter. This difference is inherent in the two classes of vehicles—bearing in mind the expressed purpose of the regulation, namely, those vehicles required to have splash guards and those whose construction offers ample protection. Vehicles designed to carry not more than seven passengers, commonly called pleasure cars, are constructed so that no splash guards are necessary. While no evidence was offered on the subject the construction of pleasure cars is quite universally known. Judges are not supposed to know less than the average persons. We take judicial notice of the difference betwen vehicles of the first and those of the second division so far as the need for splash guards is concerned.

Similar considerations justify special treatment of trucks "in transit," (hereinabove described,) which are being transported from the factory to the dealer usually with a temporary in-transit permit rather than a regular license. Clearly, it is not an unreasonable classification to permit the installation of temporary splash guards for the purpose of this single trip.

In *Hansen* v. *Raleigh*, 391 Ill. 536, 544, we said that the test of equal protection of the laws is whether the legislation in question operates equally on all persons in the class to which it applies and not whether that class is treated the same as another class. Nothing in the statute before us would indicate that all vehicles in the exempted classes of "vehicles whose construction does not require such splash guards" and "motor vehicles in transit" will not be treated the same. The legislation operates equally on all vehicles within each of these classifications.

Plaintiff in error relies principally on *Consumers Co.* v. *City of Chicago*, 298 Ill. 339, in support of his contention that the "Splash Guard Act" contains an unlawful classification. An examination of that case shows that it is to be distinguished and is not determinative of the issue before us in the legislation now under review. The court there considered a 1916 ordinance of the city of Chicago requiring "motor vehicles designed for carrying freight and merchandise of 1,500 lbs. capacity or more" to be equipped with front fenders in such a manner and design as to prevent injury to pedestrians. This court held that ordinance unconstitutional for two reasons; first, there was no known standard, nor any provided, for determining the capacity of motor trucks and, second, the classification applied only to some portion of the 13,000 freight-carrying trucks and not to the 60,000 passenger cars in use in Chicago. In regard to the latter ground the court said: "A large mass of evidence of a technical or scientific nature was heard on that subject, from which it appeared that the danger of collision with pedestrians and the front end of passenger cars is at least as great as in the case of trucks." The court determined that the classification was not based upon a substantial difference; that there was no characteristic difference, so far as the object sought to be accomplished was concerned, between trucks with a capacity of 1500 lbs. or more and the smaller motor trucks and passenger cars and the various types of special motor vehicles. We find no similarity between the ordinance in question in the *Consumers Co.* case and the statute under consideration here.

The challenged act is a proper exercise of the police power of the State and is free from any unconstitutional taint.

The judgment of the county court of St. Clair County is affirmed.

Judgment affirmed.

APPENDIX V.

1955 Illinois Mudguard Act (Ill. Rev. Stat. 1955, Chapter 95½, Par. 218 (b), p. 266)

It is unlawful for any person to operate any new motor vehicle of the second division which is purchased on and after September 1, 1955, or any motor vehicle of the second division the splash guards of which have been replaced on and after September 1, 1955, which replacement shall be necessary when present splash guards are unable to prevent the splashing of mud or water upon the windshield of other motor vehicles, upon the highways of this State outside the corporate limits of a city, village or incorporated town, unless such vehicle is equipped with rear fender splash guards which shall comply with the specifications as hereinafter provided and such splash guards shall be so attached as to prevent the splashing of mud or water upon the windshield of other motor vehicles; provided, that on and after January 1, 1957, this amendatory Act of 1955 shall apply to all motor vehicles of the second division.

The rear fender splash guards shall contour the wheel in such manner that the relationship of the inside surface of any such splash guard to the tread surface of the tire or wheel shall be relatively parallel, both laterally and across the wheel, at least throughout the top 90 degrees of the rear 180 degrees of the wheel surface and the downward extension of the curved surface shall extend to a length which shall end not more than ten inches from the ground.

Such splash guards shall be wide enough to cover the full trend [*sic*] or treads of the tires being protected and shall be installed close enough to the tread surface of the tire or wheel as to control the side-throw or wash of the bulk of the thrown road surface material and keep such bulk within a tangent not to exceed 15 degrees measured from a base line formed by the top height of the wheel.

Such splash guards may be constructed of a flexible material, but shall be attached in such a manner that, regardless of movement, either in such splash guards or the vehicle, such splash guards will retain their general parallel relationship to the tread surface of the tire or wheel under all ordinary operating conditions.

This Sectoin shall not apply to motor vehicles whose construction does not require such splash guards, nor to motor vehicles in transit and capable only of using temporary splash guards approved by the Illinois State Highway Police.

APPENDIX VI.

The Rudolph Express Co., et al., Appellees, v. *Joseph D. Bibb, Director of Public Safety, et al.*, Appellants, 15 Ill. 2d 67.

Mr. Justice Schaefer delivered the opinion of the court:

In *People* v. *Warren*, 11 Ill. 2d. 420, we sustained the validity of section 121.02 of the Uniform Act Regulating Traffic on Highways, as amended in 1955. (Ill. Rev. Stat. 1955, chap. 95½, par. 218(b).) That section required that the rear wheels of motor vehicles of the second division—those designed and used for pulling or carrying freight or for carrying more than seven passengers—be equipped with contour splash guards while being operated on State highways outside of the limits of cities, villages and incorporated towns. In 1957 the section was again amended, principally by exempting certain vehicles from its requirements. The validity of the section as amended is challenged in this case.

The plaintiffs are common and contract motor carriers of general commodities, household goods and livestock in intrastate and interstate commerce. Their complaint sought to restrain the defendants, who are public officials, from enforcing the statute. Both parties moved for summary judgment. The plaintiffs' motion was supported by affidavits; the defendants' was not. The circuit court of Sangamon County held the exemption provisions of the amendment invalid, and held also that their invalidity rendered the entire section invalid. It entered a decree for the plaintiffs, and the defendants appeal directly to this court.

As it stood when the *Warren* case was before this court, section 121.02 required that the vehicles to which it applied be equipped with rear-fender splash guards that would contour the wheel in such manner that the relationship of the inside surface of the splash guard to the tread surface of the tire or wheel would be relatively parallel, both laterally and across the wheel, at least thoughout the top ninety degrees of the rear 180 degrees of the wheel's surface. The curved surface was required to extend downward to ten inches from the ground. The splash guards were required to be wide enough to cover the full tread or treads of the

tires and to be installed close enough to the tread surface of the tire or wheel to control the side-throw or wash of the bulk of the thrown material and keep it within a tangent not to exceed 15 degrees measured from a base line formed by the top height of the wheel. The splash guards could be constructed of flexible material, but there were required to be so attached that regardless of movement of the guards or the vehicles, the guards would retain their general parallel relationship to the tread surface of the tire under ordinary operating conditions.

Certain minor changes in the design of the required contour guard were made by the 1957 amendment. Their purpose appears to have been to make compliance easier in some particulars. In any event, they do not concern us here because the circuit court held that these changes did not affect the validity of the section and the plaintiffs did not cross-appeal from that ruling.

The main controversy centers upon the validity of the following paragraph which was added to section 121.02 by amendment in 1957: "This Section shall not apply to motor vehicles which do not have more than 2 axles and which are used primarily in agricultural pursuits, nor to pole trailers, dump trucks, 'ready-mix' type of cement trucks, nor to trucks used primarily for transporting grain which are dumped or unloaded by use of hoists or lifts, nor to vehicles operated principally off the highways of this state and used primarily in public construction or for purposes associated with or in aid of drilling, mining or otherwise severing of natural resources from their natural depository nor to motor vehicles operated principally within the corporate limits of a city, village or incorporated town or within a short radius thereof; provided, the Department of Public Safety may, in order to promote greater safety on the highways of this State and accomplish the purposes of this Section, adopt and promulgate reasonable rules and regulations establishing specifications or designs for splash guards, other than the contour type of splash guard hereinbefore specified, to be used on the vehicles mentioned in this paragraph while said vehicles are operated on the highways of this State. In adopting or promulgating any such rules or regulations, the Department of Public Safety shall consider, among other things, the type of vehicle, the design or construction of the vehicle, the purpose or purposes for

which the vehicle is used, the conditions or circumstances under which the vehicle operates and the distance the vehicle travels upon the highways of this State." Ill. Rev. Stat. 1957, chap. 95½, par. 218(b).

The principal question to be determined is whether this added paragraph sets up arbitrary, capricious and unreasonable classifications, in violation of section 22 of Article IV and section 14 of article II of our constitution, and the 14th amendment to the Federal constitution. Defendants maintain that the classification is reasonable and does not offend constitutional guarantees. Plaintiffs contend that the classification is discriminatory and is unrelated to the purpose of the statute, and therefore unconstitutional. No question is raised under the commerce clause of the Federal constitution.

Section 22 of article IV prohibits the General Assembly from passing any local or special law granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever. This provision, like the equal protection clause of the 14th amendment to the Federal constitution, is designed to prevent arbitrary discrimination. (*Hansen* v. *Raleigh*, 391 Ill. 356; *Michigan Millers Fire Ins. Co.* v. *McDonough*, 358 Ill. 575.) It does not prohibit legislative classification, but it does require that the classification rest on a reasonable basis and apply uniformly to all members of the class on which it operates. *City of Chicago* v. *Willett Co.*, 1 Ill. 2d 311; *Father Basil's Lodge, Inc.* v. *City of Chicago*, 393 Ill. 246.

The apparent legislative purpose of section 121.02 is to prevent or minimize the splashing of mud or water upon the windshields of other vehicles by vehicles of the second division while they are on State highways outside of incorporated areas. The paragraph in question unmistakably requires that one group of those vehicles be equipped with specifically described splash guards, and provides that a second large group need not be so equipped. In support of their contention that the classification is unreasonable, plaintiffs submitted to the trial court the affidavits of two experts who asserted that many of the enumerated vehicles would cause as much or more splash than those not enumerated. For example, it is asserted that the tires of a two-axle vehicle used primarily in agricultural pursuits will splash as much mud and water on a wet highway as those of a

similar vehicle used primarily in manufacturing or commercial pursuits. It is unnecessary to discuss the affidavits in detail, because the defendants conceded in their argument before this court that there is no difference in general between the splash propensities of the enumerated vehicles and those which are not enumerated.

The defendants argue, however, that the statute is to be read as requiring that all vehicles of the second division must be equipped with splash guards, although those enumerated can use a type of guard prescribed by the Department of Public Safety instead of the type prescribed by the statute. In other words, they contend that the only classification that is made relates to the type of splash guard required, and that the added paragraph should not be construed as exempting the enumerated vehicles from anti-splash measures. The statute does not support this contention. It provides that the Department "may" promulgate rules and regulations establishing specifications or designs for other types of splash guards. The language is permissive and the Department has apparently so construed it for it is not suggested that any rules or regulations relating to this subject have been adopted.

We read the statute, therefore, as providing that all vehicles of the second division, except those enumerated in the added paragraph, must be equipped with the guard prescribed by the statute. The enumerated vehicles may be required to have a different type of guard only if the Department sees fit to so require. We are unable to conclude that the classification thus prescribed is reasonable.

It is true that some of the enumerated vehicles fall readily into two categories suggested by the defendants: (1) the vehicle makes only occasional use of State highways and it would be impractical to require a permanent splash guard of the kind specified when no guards at all are required on the vehicle during most of its use, and (2) the normal operation of the vehicle would cause repeated damage to the specified splash guard. But if we are to assume that the legislature intended to exclude from compliance those vehicles which make only occasional use of State highways, it is difficult to see why the specified splash guard should be required on foreign vehicles passing through this State. (See *Navajo Freight Lines, Inc.* v. *Bibb*, 159 F.

Supp. 385.) And no basis has been suggested to support the distinction which is drawn between the vehicle "used primarily in public construction" and the vehicle used primarily in private construction. There are other disparities which need not be enumerated. In our opinion the trial court properly held the added paragraph invalid.

The next question is the effect of this determination on the other five paragraphs of section 121.02. There are no very reliable clews as to the legislative intent. The statute as enacted in 1935 contained a savings clause (Ill. Rev. Stat. 1957, chap. 95½, par. 239), but we are unable to draw from that fact any significant conclusion as to the intention of the General Assembly in enacting the 1957 amendment. That the General Assembly was not entirely satisfied with the section as enacted in 1955 is apparent from the adoption of the 1957 amendment. We cannot say, however, that that dissatisfaction indicated a purpose to repeal the original enactment if the added material was held invalid. The legislature intended in 1955 that the act should be operative without the invalid exemptions. There has been no clearly expressed intention to repeal the 1955 provision and we see no significant indications that would support a repeal by implication. (*People ex rel. Akin* v. *Butler Street Foundry and Iron Co.*, 201 Ill. 236, 258; *Frost* v. *Corporation Commission of Oklahoma*, 278 U. S. 515, 525-7, 73 L. ed. 483, 490; II Sutherland Statutory Construction, 2d ed. 1943, sec. 2412.) The exemption provisions of the 1957 amendment are clearly separable from those provisions of the amendment which relate to the design of the required guard.

The plaintiffs have asked what we reconsider the validity of a portion of the section which was sustained in *People* v. *Warren*, 11 Ill. 2d 420, and was not changed by the 1957 amendment. After examining the points and authorities cited by the plaintiffs, we see no reason to modify our decision in *People* v. *Warren*.

From what has been said it follows that the trial court erred in restraining the defendants from enforcing section 121.02. The decree is reversed and the cause is remanded for the entry of a decree in accordance with this opinion.

Reversed and remanded, with direction.

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LIBRARY
SUPREME COURT, U.S.
FEB 10 1958
JAMES R. BROWNING

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1958

No. 94

JOSEPH D. BIBB, Director of the Department of Public Safety of the State of Illinois, and **WILLIAM H. MORRIS**, Superintendent of the Division of State Highway Police, Department of Public Safety of the State of Illinois,

Appellants,

vs.

NAVAJO FREIGHT LINES, INC., a New Mexico corporation, **RINGSBY TRUCK LINES, INC.**, a Nebraska corporation, **PRUCKA TRANSPORTATION, INC.**, a Nebraska corporation, **DENVER CHICAGO TRUCKING CO., INC.**, a Nebraska corporation, **WATSON BROS. TRANSPORTATION CO., INC.**, a Nebraska corporation, **PACIFIC INTERMOUNTAIN EXPRESS CO.**, a Nevada corporation, and **ARKANSAS BEST FREIGHT SYSTEM, INC.**, an Arkansas corporation,

Appellees.

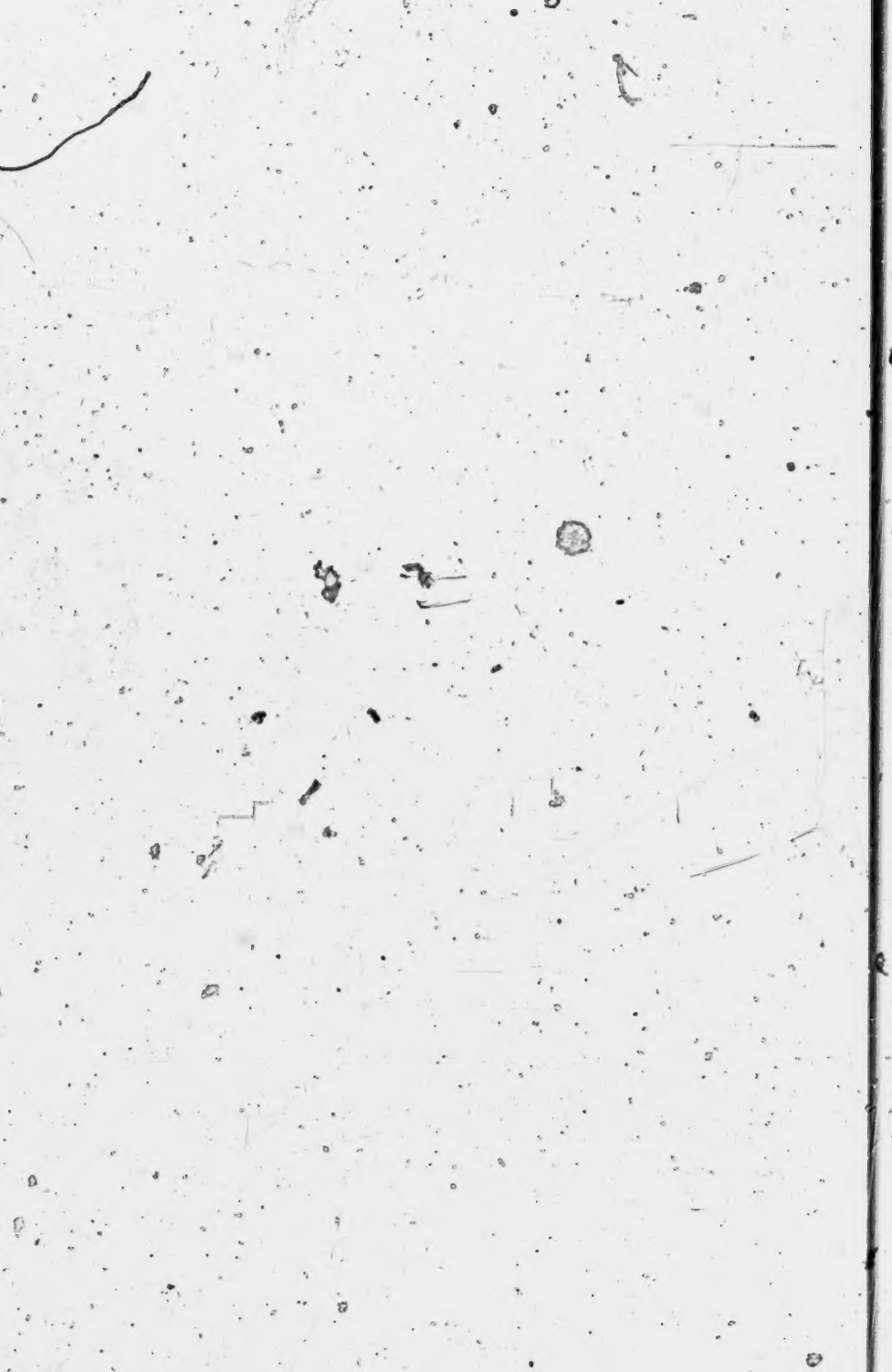
ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS, SOUTHERN DIVISION.

BRIEF FOR APPELLEES.

Certificate of Service Appended at Page 29

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JACK GOODMAN,
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MACK STEPHENSON,



INDEX.

	PAGE
Question Presented	1
Statement of the Case	2
Summary of Argument	11
Argument	13
I. The District Court correctly concluded that the appropriate test of the validity of the Illinois Splash Guard Act is whether the peculiar contribution, if any, to safety made by the contour splash guard required by the statute is sufficient to outweigh the burdens and obstructions imposed upon interstate commerce	13
II. The District Court correctly applied the appropriate test in determining, on the present record, that the Illinois Splash Guard Law is invalid as applied to interstate motor carrier operations because it imposes burdens and obstructions upon interstate commerce far out of proportion to its dubious contribution to safety on the highways	21
Conclusion	28
Certificate of Service	29

Authorities Cited.

Cases.

Castle v. Hayes Freight Lines, 348 U. S. 61 24
Dean Milk Company v. City of Madison, 340 U. S. 349 15
Kansas City Southern Railway Company v. Kaw Valley Drainage District, 230 U. S. 75 14
Keily v. State of Washington, ex rel., Foss & Company, 302 U. S. 1 25
Maurer v. Hamilton, 309 U. S. 598 ..... 17, 19, 20
Minnesota v. Barber, 136 U. S. 313 15
Morgan v. Virginia, 328 U. S. 373 ..... 26, 27
Nebbia v. New York, 291 U. S. 502 15
People v. Warren, 11 Ill. 2d 420 ..... 14, 16
Rudolph Express Company v. Bibb, 15 Ill. 2d 67 14
South Carolina Highway Department v. Barnwell Bros., 303 U. S. 161 ..... 17, 18, 19
Southern Pacific Company v. Arizona, 61 Ariz. 66 and 325 U. S. 761 ..... 15 passim
Sproles v. Binford, 286 U. S. 374 ..... 17, 20

U. S. Constitution.

Art. I, Sec. 8 ..... 1, 11 passim
Amendment XIV 14

Statutes.

Illinois Mudguard Act of 1957 (Ill. Rev. Stat. 1957, Ch. 95½, Par. 218-b, Vol. II, p. 226) ..... 1 passim
Interstate Commerce Act, 1940, 54 Stat. 899, 49 U. S. C. A., c. 1, n. 1 (Supp. 1958) 24

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1958.

No. 94.

JOSEPH D. BIBB, Director of the Department of Public Safety of the State of Illinois, and WILLIAM H. MORRIS, Superintendent of the Division of State Highway Police, Department of Public Safety of the State of Illinois,

Appellants,

vs.

NAVAJO FREIGHT LINES, INC., a New Mexico corporation, BINGSBY TRUCK LINES, INC., a Nebraska corporation, PRUCKA TRANSPORTATION, INC., a Nebraska corporation, DENVER CHICAGO TRUCKING CO., INC., a Nebraska corporation, WATSON BROS. TRANSPORTATION CO., INC., a Nebraska corporation, PACIFIC INTERMOUNTAIN EXPRESS CO., a Nevada corporation, and ARKANSAS-BEST FREIGHT SYSTEM, INC., an Arkansas corporation,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS, SOUTHERN DIVISION.

BRIEF FOR APPELLEES.

QUESTION PRESENTED.

The only question presented by this appeal is whether or not the Illinois statute which requires the so-called contour splash guard unduly and unreasonably burdens interstate commerce in violation of Article 1 Section 8 of the Constitution of the United States when applied to interstate motor carriers operating under certificates of public convenience and necessity issued by the Interstate Commerce Commission.

STATEMENT OF THE CASE.

Appellees as motor carriers of property in interstate commerce, certificated by the Interstate Commerce Commission, are required to provide reasonably continuous and adequate service throughout the area they are authorized to serve (Rec. 54, District Court Opinion, Rec. 305). Because the Illinois Contour Splash Guard Statute severely restricts their ability adequately to perform all service in interstate commerce as required by their certificates, they instituted this action to enjoin the State of Illinois from requiring them to substitute the "contour" type splash guard for the conventional straight mudguard which satisfied the requirements of the previous Illinois statutes and the statutes of all other states in which they operate.*

The District Court found on the basis of overwhelming

* The so-called conventional or straight splash guard which hangs perpendicular to the floor of the trailer is either permitted or required by every State except Illinois. The District Court stated: "We were led to believe at the time of the hearing, and still believe, that all of the States, except Illinois and perhaps Oregon and Idaho, require nothing more than the conventional or straight mudflap, none of which would comply with the Illinois Act." (Rec. 294.) It is the requirement of the Illinois Act that the splash guard "contour" the wheel in a certain prescribed way which makes the Illinois statutory requirements different from that of any other State. The statutes of all other States—even those using the word "fender" to describe the splash guard,—are satisfied by the so-called straight or conventional splash guard. The word "contour" makes the Illinois statute different from that of any other State and causes the splash guards of every other State to be illegal in Illinois. The straight or conventional splash guard is presently in use in both Idaho and Oregon (Rec. 115). A mere reading of the Idaho (Title 49, Sec. 840 Idaho Code 1957) and Oregon (Sec. 483.458 Oregon Revised Statute 1955) statutes demonstrates that a straight splash guard will satisfy their requirements, since the bottom of the trailer itself forms the cover over the wheel and neither Oregon nor Idaho specify that the required splash guard *contour* the wheel a certain distance from the tire.

and largely uncontroverted evidence that the Illinois statute which requires a "contour" type splash guard for the rear wheels of certain described trucks and trailers (Section 121.02 of the Uniform Act Regulating Traffic on Highways, being Section 218b of Chapter 95½ Ill. Rev. Stat.), severely burdens and even obstructs commerce between the States. There follows a brief summary of the facts which were the basis for the District Court's findings:

1. Interline operations by Interstate Motor Carriers will be disrupted.

In the course of serving the shipping public, appellees, as well as almost all other interstate carriers, provide both on-line and off-line service (Rec. 55-58, Opinion of the District Court, Rec. 293). The former term refers to a shipment which originates and terminates on the line of the same carrier. Off-line service describes a situation where a shipment originates with one carrier destined for a point which is not served by that carrier. In such cases the trailer of the originating carrier is physically transferred to the delivering carrier at some interchange point which both serve. Interlining (or the interchange of freight) is a vital part of Appellees' service to the shipping public (Finding of Fact Nos. 13, 14, 19, 22, Rec. 308-309). In connection with the transportation of certain commodities, the continuation of such practice is vital to the rendering of adequate service. Perishables carried in refrigerated trailers, explosives carried under seal, and various other items which it would be impossible or impracticable to transfer physically from one trailer to another must be interlined (District Court Opinion, Rec. 293). This practice may result in the trailer's moving to Arkansas or Illinois or any other state (District Court Opinion, Rec. 292, 293). It is impossible to segregate trailers according to the state or area that they may be required to travel into or through as a result of

interlining (District Court Opinion, Rec. 292, 293, Finding of Fact No. 19, Rec. 308).

Since the Illinois Contour Splash Guard Statute requires that all trailers entering Illinois be equipped with the contour splash guard, a carrier operating into Illinois will not only be required so to equip all of its vehicles, but will also have to make sure that all trailers which it accepts in interchange destined for points in Illinois or which must move through Illinois in interstate commerce to reach their destination are also equipped with the contour guard (District Court Opinion, Rec. 294, Finding of Fact Nos. 19, 20, Rec. 308). Appellees and other carriers operating into or through Illinois have no way of compelling other carriers, who do not serve Illinois directly, to install and maintain contour splash guards on their equipment (Finding of Fact No. 20, Rec. 308). Accordingly, if and when these other carriers who do not serve Illinois points refuse to equip their trailers with contour splash guards, the interchange service of all carriers will be disputed (Finding of Fact No. 20, Rec. 308). At no time have Appellants attempted to controvert this evidence or the findings of the District Court which are based on it.

2. Commerce between Illinois, Arkansas and any other state passing similar specific statutes will be completely obstructed.

On December 13, 1957 the Arkansas Public Service Commission entered an order which requires that trailers moving on Arkansas highways be equipped with a "perpendicular, flexible type mudguard hanging at a right angle from the trailer" (Rec. 110, District Court Opinion, Rec. 295). This language describes the so-called conventional or straight splash guard. Since the Illinois Splash Guard Act requires that the guard "contour" the wheel, it is

impossible for one piece of equipment to operate legally in both Illinois and Arkansas (Rec. 68-69, 106-107, District Court Opinion, Rec. 295-296, Finding of Fact Nos. 9 and 12, Rec. 307).

Appellants, in their brief, suggest on the basis of a single isolated excerpt from the record that vehicles stop at the State line to change splash guards (Appellants' Brief, p. 9). The District Court dealt carefully with this possibility and discounted it on the basis of evidence cited in its opinion (Opinion of District Court, Rec. 296-297). In many cases where the vehicle carries explosives or inflammables, it would be impossible to use the soldering tools necessary to install a contour splash guard (Rec. 72, 111, Finding of Fact No. 21, Rec. 309). Furthermore, since the very advantage of motor carrier transportation is its speed, the ability of motor carriers to continue to offer adequate service will be severely disrupted if carriers are to be compelled to weld equipment onto trailers when entering various States, and tear off this same equipment when entering other States (Rec. 72, Finding of Fact No. 21, Rec. 309).

3. Contour Splash Guards are not more effective than conventional equipment.

Considerable evidence was introduced to show that in fact the "contour" splash guard does not cope with the alleged spray problem any more effectively than does the conventional splash guard (Finding of Fact No. 28, Rec. 310). Numerous of plaintiffs' witnesses testified that they had carefully watched the contour splash guard in use and that it did not reduce spray any more effectively than the straight splash guard, if as well (Rec. 118, 126-127, 148-149). It was also established that because the contour splash guard must be placed close to the wheel—which is directly contradictory to the advice of the Society

of Automotive Engineers—it cannot possibly catch as much spray as does the straight splash guard (Rec. 126-127, 239-240). Based on this testimony and the diagram drawn for the Court by one of Appellees' witnesses (Rec. 239-240), the District Court concluded that "it was also conclusively shown that the contour mud flap possesses no advantages over the conventional or straight mud flap previously required in Illinois and presently required in most of the States. Counsel for defendants in oral argument substantially so conceded * * *" (District Court Opinion, Rec. 295, see also Finding of Fact No. 24, Rec. 309).

4. Contour Splash Guard will increase the hazards of Highway Travel throughout the United States.

In addition to the fact that the contour splash guards do not reduce spray any more effectively than does the conventional equipment, it was also proved that they introduce new dangers to highway traffic. Because of the difficulty in attaching them, the great amount of vibration they are subject to, and the fact that because of their position on the vehicle they receive many blows, the contour guards do not stay on very long and are very likely to fall off onto the highway and present a danger to other vehicles using roads not only in Illinois, but throughout the country. Companies attempting to use contour splash guards have experienced a great deal of difficulty keping them on their vehicles (Rec. 81-82, 127, 147, Finding of Fact Nos. 25 and 26, Rec. 309). Losing such contour guards on the highway surface introduces a new and unnecessary hazard to road travel all over the United States whether they are made of metal or some flexible material. Even the so-called flexible contour splash guard must have considerable rigidity in order to contour the tire as required and it must also be attached with some kind of metal which is likely to

come off when the splash guard comes off. The conventional straight mudguard on the other hand presents no similar danger since it is less likely to come off and, if it should it lies flat on the highway without presenting any comparable obstruction to oncoming traffic (Rec. 85, 98-99, 117, 149, Finding of Fact No. 26, Rec. 309).

In addition, the contour splash guard, because of its being mounted close to the wheel, does not permit sufficient cooling or heat dissipation of the brake drum, thus increasing the danger of brake fade from overheated brakes, with the result, as the District Court found, that "a new hazard will be added to interstate commerce all over the United States" (Rec. 119, 124-125, 128-135, 234-236, Finding of Fact Nos. 27 and 28, Rec. 309-310). Moreover, the close proximity of the splash guard to the tire increases the probability and danger of unusual tire trouble (Rec. 90-94). Because of these considerations, safety engineers for the appellees testified persuasively that they would not willingly use the contour splash guards required by the Illinois statutes, irrespective of the increased costs involved (Rec. 116-117, 125-126).

On the basis of such evidence the District Court made its ultimate finding of fact that the "Illinois Contour Splash Guard Act, while placing a substantial burden and obstruction upon the free flow of interstate commerce, does not contribute to safety in Illinois, and in fact introduces new dangers and hazards to highway travel in Illinois and throughout the United States not hitherto in existence" (Finding of Fact No. 30, Rec. 310).

5. All relevant evidence introduced was summarized in the District Court's Opinion and Findings of Fact.

As is evident, even from the foregoing brief summary, the District Court in its findings of fact and opinion gave exhaustive and comprehensive consideration to the entire subject matter of this case. Both parties were given every opportunity to introduce testimony with regard to the advantage or disadvantage of using a contour splash guard and its contribution to safety and burden upon commerce. All evidence presented was considered—and the opinion and findings of the Court did not overlook any relevant material presented at the trial. Yet, in spite of this, appellants suggest that certain evidence important to their case was not summarized or reflected in the Court's Opinion and Findings of Fact (Appellants' Brief, p. 8). They then proceed to draw from isolated pieces of testimony contained in the record and specifically rejected by the Court. For example, appellants state "A plastic contour splash guard when backed into an object * * * snaps back into position and is not damaged. Even when a plastic contour splash guard was subjected to ten times the vibration that you would get on the road, it was not damaged" (Appellants' Brief, p. 8). However, the District Court specifically found "that because the contour splash guard is difficult properly to affix to the trailer, and because in its position it is peculiarly liable to receive many blows and be subject to vibration, it is particularly liable to come off while the vehicle is in operation, presenting a hazard to oncoming traffic, and creating a difficult and costly maintenance problem for carriers" (Finding of Fact No. 25, Rec. 309).

Next, appellants assert that the District Court failed to consider evidence to the effect that "a contour splash guard, unlike a 'flat' or 'apron' type mudguard, will throw debris down instead of straight out" (Appellants' Brief,

p. 8). This assertion completely ignores the Court's finding "that the contour splash guard required in Illinois does not reduce the spray and splash caused by motor vehicles on highways any more effectively than the conventional or straight splash guard permitted in forty-five (45) States, if as well" (Finding of Fact No. 24, Rec. 309). In addition, appellants state "When one is driving behind a unit that has *inadequate* splash guards, mud and water is thrown all over the windshield of a following vehicle with momentary loss of vision. When one loses vision he drops the side of his car off the paved area of the road and many accidents are caused by trying to right the car from such rolling" (Appellants' Brief, p. 8) (Emphasis ours). This statement repeats the statement of one of appellants' witnesses whose testimony was obviously not accepted by the District Court in the light of overwhelming contradictory evidence. Furthermore, appellants' use of the word "inadequate" is, to say the least, misleading. At no time during the course of the trial did appellants seek to prove that the straight splash guard is inadequate. In fact, the Assistant Attorney General insisted throughout the trial of the case that evidence concerning the effectiveness of the straight splash guard was irrelevant and that any comparison of the relative merits of the contour splash guard as against the straight conventional splash guard was inappropriate (Rec. 264).

Again taking isolated statements out of the record, appellants set forth that contour splash guards keep stop and flicker lights and license plates from being obscured and permit a vehicle to follow within 20 or 30 feet of a unit so equipped (Appellants' Brief, p. 8). Appellants made no effort to show that back lights and license plates are obscured when a vehicle is equipped with a straight splash guard. Nor did they establish that it is any less safe to follow a vehicle equipped with a straight guard within

20 to 30 feet than it is one equipped with a contour guard. This is reflected in Finding No. 24 quoted above in which the Court specifically states that the contour splash guard is no more effective than the straight splash guard.

Another piece of evidence which appellants claim was overlooked by the District Court was testimony "that a mechanic who had no prior experience in installing such mudguards on a trailer could install such mudguards on a single axle vehicle in one hour and that it would take 'a little longer' to mount such mudguards on a two-axle vehicle" (Appellants' Brief, p. 9). Actually, the District Court did not fail to consider this contention because it specifically found "that it would be impossible in most cases, and impracticable in others, for plaintiffs to equip trailers obtained by interlining with the splash guard required by Illinois" (Finding of Fact No. 21, Rec. 309). Furthermore, the Court found "that by virtue of the conflicting requirements of Illinois and Arkansas, the free flow of commerce by motor carriers is obstructed because equipment legal in one State is illegal in the other" (Finding of Fact No. 12, see also Nos. 9, 10 and 16, Rec. 307-308). Furthermore, no evidence was adduced by appellants to show the type of tools necessary to change splash guards on the road before entering Illinois. Nor in fact was it explained how a driver could stop on the road in bad weather and undertake to change the vehicle's equipment.

Thus, not only have appellants been unable to find a relevant factual question with which the District Court failed to deal, but, in addition, it must be emphasized that the isolated statements in the record to which appellants have referred do not justify any change in the District Court's findings.

SUMMARY OF ARGUMENT.

The District Court correctly concluded that the appropriate test of the validity of the Illinois Statute under attack is whether the peculiar contribution, if any, which it makes to the safety of highway operations is sufficient to outweigh the burdens and obstructions which it imposes upon interstate commerce. In applying this test, the District Court was not bound by the State Legislature's judgment, but was obligated to exercise its own independent judgment with respect to the relative weights of the burdens imposed upon interstate commerce and the contribution to highway safety resulting from the application of the statute. In this connection, it was particularly pertinent to determine whether the purported safety objectives of the statute could not be equally or better achieved without the imposition of comparable burdens upon interstate transportation. The principles applicable to such a determination are so fundamentally different from those applicable in determining the validity of state legislation challenged under the due process clause of the Fourteenth Amendment, that the decisions of the Illinois Supreme Court sustaining the present statute against due process attacks are of no persuasive effect with respect to the questions presented in this litigation.

Decisions of this Court have made the correctness of these principles unmistakably clear in dealing with purported safety regulations applicable to other types of interstate transportation. There is no reason to suppose that the same principles are not equally applicable to interstate motor carrier operations conducted under certificates of public convenience and necessity issued by the Interstate Commerce Commission. The decisions of this

Court upon which appellants rely, sustaining statutes regulating motor carrier operations over the highways, are entirely consistent with these principles. Those decisions concern statutes which dealt with varying local conditions and which were amply justified, in terms of the tests above suggested, by the factual records in the particular cases. Because of these differences, both in the nature of the regulations involved and in the factual records supporting them, those decisions lend no support to appellants' position.

The District Court was equally correct in its application of the foregoing principles to the particular facts of this case. The record provides overwhelming support for the findings of the District Court with respect to the dubious contribution to safety made by the contour guard over and above that made by the conventional or straight guard, as well as the additional hazards it creates for highway traffic, the burdens which the statute imposes on the efficiency and economy of interstate motor carrier operations, and the obstructions which have already arisen and are likely to arise to interstate motor transportation on account of conflicting state regulations dealing in unnecessary detail with the exact structure and design of this type of equipment. The cumulative effect of these considerations amply justified the District Court in concluding that the Illinois statute attempts a type of regulation which the commerce clause requires must be provided, if at all, by a national authority capable of prescribing a single uniform rule.

ARGUMENT.

I.

The District Court correctly concluded that the appropriate test of the validity of the Illinois Splash Guard Act is whether the peculiar contribution, if any, to safety made by the contour splash guard required by the statute is sufficient to outweigh the burdens imposed upon interstate commerce.

The appellants throughout this proceeding have persistently sought to evade the fundamental issue tendered by the complaint and squarely resolved by the District Court, namely, whether the Illinois statute in requiring a splash guard of a particular design, different than that required by any other State, makes a unique contribution to highway safety sufficient to offset the burdens it imposes upon interstate motor carrier operations. The plaintiffs have asserted, and the District Court has found, that the statute imposes substantial additional costs of installation and maintenance, threatens to interfere with the interline operations of the plaintiffs by precluding or discouraging other carriers from sending trailers into Illinois, and also makes virtually impossible both single and interline operations between certain States, particularly Arkansas and Illinois, because of conflicting statutory requirements. The Court has also found that the equipment required by the statute makes virtually no contribution to the safety of highway operations beyond that accomplished by the customary splash guards and in fact introduces additional and substantial highway hazards which more than overbalance its dubious greater efficiency in cutting down back or side splash.

Instead of seriously contesting the validity of these find ings, the appellants have persistently taken refuge in wha this court has aptly called "the convenient apologetics o the police power." *Kansas City Southern Railway Com pany* v. *Kaw Valley Drainage District*, 230 U. S. 75, 7 They have even gone so far as to imply that the decision of the Supreme Court of Illinois in *People* v. *Warren*, 1 Ill. 2d 420 and *Rudolph Express Company* v. *Bibb*, 15 Il 2d 67, sustaining the Illinois statute against challenge under the due process clause, correctly states the principle which should be dispositive of this case. Examination o the opinion of the Illinois Supreme Court in the *Warre* case will show that the Court did indeed adopt the princi ples which appellants have invoked in this proceedin namely, that if the statutory requirement has some reason able relationship to the end which the Legislature right fully aims to achieve, it is immaterial whether other "mor simple and inexpensive" methods might equally or bette serve that end. We do not deny that this may be the appro priate test for disposing of a due process claim such a that presented to the Illinois Supreme Court. Howeve we submit that the District Court was clearly correct, an in accord with an unbroken line of decisions by this Cour in holding that it is not the appropriate test for disposin of the claim that the statute imposes an undue and unrea sonable burden upon interstate motor carrier operation such as those conducted by the present plaintiffs.

This Court has frequently had occasion to emphasize th difference in principles applicable in determining whethe a State statute is so unreasonable as to violate the du process clause, on the one hand, and in determining whethe it imposes an undue and unreasonable burden upon inte state commerce, on the other. With respect to the fir question, the presumption of constitutionality is so stron

as to be almost controlling; it can be rebutted, as this Court has said, only by showing that the means chosen are either arbitrary or discriminatory or have no reasonable relation to a proper legislative purpose. *Nebbia* v. *New York*, 291 U. S. 502, 537. With respect to the second question, the presumption of constitutionality cannot foreclose a searching judicial inquiry both as to the extent of the interference with interstate commerce and as to the question whether the legitimate objectives of the State could be adequately achieved without the imposition of comparable burdens upon, or obstructions to, interstate commerce. Compare *Minnesota* v. *Barber*, 136 U. S. 313 (1890); *Dean Milk Company* v. *City of Madison*, 340 U. S. 349 (1951).

The application of these principles is forcefully illustrated by the decision of this Court in *Southern Pacific Company* v. *Arizona*, 325 U. S. 761, holding invalid as an undue burden upon interstate commerce an Arizona statute making it unlawful to operate within the State railroad trains consisting of more than a specified number of cars. In a suit in the State court to recover statutory penalties, the railroad defended on the ground that the statute conflicted with the due process clause, the commerce clause and Federal legislation. The trial court gave judgment for the railroad, holding the statute invalid on all three of the grounds asserted. The Arizona Supreme Court reversed, largely on the grounds that the statute was enacted "for the purpose of the safety and protection of employees and of the people being transported over the railroads in our State" (*State of Arizona* v. *Southern Pacific Railroad Company*, 61 Ariz. 66, 70). The Court also relied on the proposition that "when a subject lies within the police power of the State, debatable questions as to reasonableness are not for the courts, but for the Legislature, which is entitled to form its own judgment, and its action within its range of discretion cannot be set

aside because compliance is burdensome." (61 Ariz. at 72). In reversing the decision of the Arizona Supreme Court solely on the ground that the statute offended against the commerce clause, this Court, speaking through Chief Justice Stone, carefully restated the controlling principles:

> "Hence the matters for ultimate determination here are the nature and *extent of the burden* which the state regulation of interstate trains, adopted as a safety measure, imposes *on interstate commerce*, and whether the relative weights of the state and national interests involved are such as to make inapplicable the rule, generally observed, that the free flow of interstate commerce and its freedom from local restraints in matters requiring uniformity of regulation are interests safeguarded by the commerce clause from state interference." (325 U. S. at 770-771.) (Emphasis ours.)

The decision of the Illinois Supreme Court in *People v. Warren, supra*, with respect to the validity of the Illinois statute under the due process clause, is certainly no more persuasive than was the decision of the Arizona Supreme Court with respect to the validity of the Arizona Train Limit Law. On the contrary, it may fairly be said that the decision of the Illinois Court is less persuasive, since unlike the Arizona Court, it was not even called upon to consider the validity of the Illinois statute under the commerce clause. However, the District Court in the present case, like the trial court in the *Arizona* case, has made detailed findings of fact, based upon an elaborate record, demonstrating that the contribution of the challenged statute to safety is negligible, and greatly overbalanced by other hazards which it creates and by the burdens which it imposes upon the economy and efficiency

of interstate operations. These findings provide as sound a factual basis for the application of the governing principles stated by Chief Justice Stone, as this Court found in the record of the *Southern Pacific* case.

It is also noteworthy that this Court in the *Southern Pacific* case explicitly recognized that Congress could have prescribed a uniform rule with respect to permissible train lengths with the effect of superseding state laws. Nevertheless, this Court held that the commerce clause alone, in the absence of any controlling Federal statute, had the effect of invalidating the statute. On this point too, Chief Justice Stone's comment is equally applicable here:

> "For 100 years it has been accepted constitutional doctrine that the commerce clause without the aid of Congressional legislation thus affords some protection from, state legislation inimical to the national commerce and that in such case, where Congress has not acted, this Court, and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests." (325 U. S. at 769.)

Appellants contend that the general principles enunciated and applied in the *Southern Pacific* case have no application here because that was a railroad case while this concerns the use of state highways. In support of this proposition, they rely upon the decisions of this Court in *South Carolina Highway Department* v. *Barnwell Bros.*, 303 U. S. 161, *Maurer* v. *Hamilton*, 309 U. S. 598, and *Sproles* v. *Binford*, 286 U. S. 374. From these cases appellants would apparently extract the principle that, where state statutes purporting to promote safety in the use of the highways are concerned, the courts have no independent responsi-

bilities for determining the extent to which safety is in fact enhanced, as compared with the extent to which interstate commerce is impeded, and particularly whether the same safety objectives could not be equally or better achieved without imposing comparable burdens on interstate commerce. A moment's reflection will demonstrate the unsoundness of this proposition. If adopted it would leave each State free to prescribe the exact type of motor vehicle equipment favored by that particular state, even though many other types in actual operation in interstate commerce were equally suitable from the standpoint of safety and perhaps more desirable from the standpoint of economy and efficiency. Thus, interstate commerce by motor carrier would become virtually impossible unless the states could agree on a single type of equipment, or the Federal government stepped in to provide a single uniform rule.

Furthermore, closer examination of the very cases relied upon by the appellants will establish the unsoundness of their position. Thus, the opinion of Mr. Justice Stone in the *Barnwell* case emphasizes throughout the special relationship between the size and weight of motor vehicles and the construction and upkeep of the roads themselves. Even with regard to this particular type of regulation, Mr. Justice Stone did not foreclose judicial scrutiny into the reasonableness of the legislation and its bona fide connection with the preservation and use of the highways. Rather he indicated that the legislative judgment was entitled only to the presumption of validity and that this presumption could be upset by showing that facts judicially known or established in the record demonstrated the unreasonableness of the legislative judgment. As Mr. Justice Stone's opinion also indicates, the record in the *Barnwell* case itself provided "adequate support" for the legislative judgment (303 U. S. at 195). Included in that record was the

report of a special commission appointed to investigate motor transportation in the state, and the report of the state engineer who had constructed the concrete highways of the state, both indicating the need for size and weight limitations at least as rigorous as those prescribed. Needless to say, there is no comparable objective and disinterested evidence in the record of this case, or in the history of this legislation, indicating the need for, or appropriateness of, contour splash guards, either to preserve the highways of Illinois, or to enhance the safety of their use. On the contrary, the District Court specifically found that the Act did not contribute to safety, and in fact introduced new hazards to highway travel throughout the United States.

Turning next to the *Maurer* case, it is significant that the Attorney General's own quotation from that opinion contains the following sentence.

> "The *present record* lays a firm foundation for the exercise of State regulatory powers, unless the State has been deprived of that power by Congressional action authorizing the Commission to substitute its judgment for that of the state legislature as to the need and propriety of the state regulation" (309 U. S. at 603; Appellants' Brief, p. 11). (Emphasis ours.)

This reference to "[t]he present record" makes it clear that no unequivocal abdication by the Federal Courts of their duty to protect the free flow of interstate commerce from undue burdens and obstructions was intended. In *Maurer*, as in *Barnwell*, considerable affirmative evidence was in fact introduced to show Pennsylvania's need for the statute under attack, as indicated by this further statement of the Court:

> "* * * [t]here was extensive evidence tending to show that the transportation by appellants over the state highways of cars placed above the cab of the trans-

porting vehicle is unsafe to the driver and to the public, the trial court found that the location of motor vehicles over the cab of the carrier rendered its operation dangerous on the curves and grades of the Pennsylvania highways" (309 U. S. at 600-601).

Mr. Justice Stone then summarized additional findings of fact before concluding that, because of the local need for the legislation, the slight burden placed upon interstate commerce was neither undue nor unreasonable.

Similarly in *Sproles* v. *Binford*, this Court gave considerable attention to the comprehensive findings of the District Court establishing "according to the special requirements of local conditions" (286 U. S. at 390), the need for, and reasonableness of, the particular size and weight limitations involved, before concluding as a matter of law that the burden on commerce was neither undue nor unreasonable. Here, too, the Court was dealing with size and weight limitations which are peculiarly related to the particular characteristic of highways in each state such as widths, texture, curves, bridges, overpasses and the like—and, which therefore, as Chief Justice Hughes specifically stated, "fall within the established principle that in matters admitting of diversity of treatment, according to the special requirements of local conditions, the States may act within their respective jurisdictions until Congress sees fit to act." As this record amply demonstrates, there are no comparable peculiar local characteristics of highway or traffic conditions which would justify Illinois in prescribing a different type of splash guard than that accepted as adequate in all the other states of the Union. Finally, it should be noted that Chief Justice Hughes added to his previous statement of general principle the following significant qualification, "As this principle maintains essential local authority to meet local needs, it follows that one state cannot establish standards

which would derogate from the equal power of other states to make regulations of their own" (286 U. S. at 390). This qualification creates no difficulties as far as size and weight limitations are concerned, since each state can indeed prescribe its own standards and interstate commerce can proceed uninterruptedly so long as it comply with the strictest standard applicable in any of the states through which it passes. However, the same cannot be said of the present case where the prescription of a particular type of equipment is necessarily exclusive of other types and thus invites the kind of irreconcilable conflict between different states in which the present plaintiffs are now involved.

We submit, therefore, that there is no justification for the suggestion that the general principles announced in *Southern Pacific* v. *Arizona, supra,* are not applicable to interstate motor carrier operations as well as to interstate railroad operations, and no reason to doubt that the District Court applied the appropriate test in determining the validity of the Illinois Splash Guard Statute.

II.

The District Court correctly applied the appropriate test in determining, on the present record, that the Illinois Splash Guard Law is invalid as applied to interstate motor carrier operations because it imposes burdens and obstructions upon interstate commerce far out of proportion to its dubious contribution to safety on the highways.

As must be evident simply from reading the opinion and findings of fact of the District Court, once its choice of governing principle is accepted, there can hardly be any serious question regarding the correctness of its decision on the particular facts of this case. As already indicated

in our Statement of the Case, the Attorney General, by referring to some isolated bits of evidence which he asserts are not adequately reflected in the Court's findings or opinion, does make a rather half-hearted attempt to cast doubt on the correctness of the finding that the "contour splash guard required in Illinois does not reduce the spray and splash caused by motor vehicles on highways any more effectively than the conventional or straight splash guard" (Rec. 309). For example, the Attorney General now asserts that "The defendants' evidence summarized in the Statement of the Case, *ante*, is that a contour splash guard, unlike a 'flat' or 'apron' type will throw debris down instead of straight out (Rec. 201, 222), and will thus prevent its being hurled into faces of drivers passing the vehicle equipped with contour splash guards" (Appellants' Brief, 16). Examination of the pages of the record to which the Attorney General refers will reveal that the witnesses then under examination did not themselves conclude, nor provide any factual basis, in terms of actual observation or otherwise, for the Attorney General's conclusion, that a straight mud guard would not have substantially the same effect upon side spray or splash as the contour guard. Furthermore, several other witnesses testified on the basis of comparative observations that they could find no difference in actual effect upon side spray as between the contour guards and the straight or conventional guards (Rec. 118, 126-127, 148-149). Thus, even fully accepting the testimony of defendants' witnesses at face value, the District Court was justified in finding that the "contour splash guard * * * does not reduce the spray and splash caused by motor vehicles on highways any more effectively than the conventional or straight splash guard."

In view of this conclusion with respect to the merits of the greater safety claims asserted on behalf of the contour guard, the District Court would have been warranted

in holding the statute invalid solely on the ground that it arbitrarily imposed substantial additional costs of operation on interstate motor carriers. Although witnesses for the appellants sought to minimize these costs, the District Court found that each of the plaintiffs would be required to lay out for the original purchase of equipment alone substantial sums ranging from $4,500 to $45,000, plus additional costs of installation, maintenance and replacement (Rec. 292). These figures themselves would be sufficient to establish the impairment of the "efficiency and economy" of motor carrier operations which, in the absence of any added safety factor, would justify the conclusion of undue burden upon interstate commerce. Compare *Southern Pacific Company* v. *Arizona*, 325 U. S. at 781-782. However, witnesses for the plaintiffs made it clear that it was not merely these additional costs of operation to which they were objecting, but also the inherent unsoundness, from the point of view of both safety and efficiency, of the type of equipment with which the Illinois Statute would saddle them. This was demonstrated by the deleterious effects upon brakes and tires which the contour guards would have (Rec. 119, 124-125, 128-135, 234-236), as well as the difficulties involved in keeping them from being damaged or dislodged in normal trucking operations (Rec. 81-82, 127, 147, 309). These considerations were properly summarized in the District Court's finding that the contour guard "introduces new dangers and hazards to highway travel in Illinois and throughout the United States" and provided additional grounds for the conclusion that the statute unduly burdens interstate commerce.

Finally, the District Court gave appropriate weight to the dangers of conflicting state regulations, already illustrated by the impasse between Arkansas and Illinois, which would create artificial barriers to interstate motor carrier operations and to some extent completely obstruct such

operations. In this connection, the Court recognized th pertinency of the national interest in the plaintiffs' abilit to provide continuous and adequate service as require by their certificates of convenience and necessity issue by the Interstate Commerce Commission, just as this Cour in *Southern Pacific Company* v. *Arizona, supra,* recognize that the enforcement of the Arizona Train Limit Law woul interpose a "substantial obstruction to the national polic proclaimed by Congress to promote adequate, economica and efficient railway transportation service" (325 U. S. a 773). Congress has, of course, proclaimed the same polic with respect to motor carrier operations in interstate com merce (Act of September 18, 1940, c. 722, Title I, § 1, 5 Stat. 899, 49 U. S. C. A., c. 1, n. 1, Supp. 1958), and ha taken many steps to effectuate it. Compare *Castle* v *Hayes Freight Lines,* 348 U. S. 61. These considerations too, lend additional support to the conclusion that th Illinois statute unduly burdens interstate commerce.

The foregoing considerations may also be summarize in the proposition often applied by this Court that th state statute invades those phases of national commerc with respect to which the commerce clause itself require that the regulation, if any, must be by a national authorit capable of prescribing a single uniform rule. The decision of this Court demonstrate that the application of this prin ciple of required uniformity cannot be defined in abstrac terms, but must be determined by the effects of the par ticular state regulation upon the particular type of com merce involved. In the *Southern Pacific* case, it was th "necessity of breaking up and reassembling long trains a the nearest terminal points before entering and after leav ing the regulated state", in order to conform with variou state laws, which was found to impose a "serious imped ment to the free flow of commerce" and to suggest "th practical necessity that such regulation, if any, must b

prescribed by a single body having a nationwide authority" (325 U. S. at 775). In *Kelly* v. *the State of Washington, ex rel. Foss and Company*, 302 U. S. 1, the subject matter of state regulation involved was the inspection of the hulls and machinery of tugs whose principal business consisted of moving in and about the harbors of the state, vessels largely engaged in interstate commerce. This Court held that such inspection concerns "* * * a field in which the state law could operate without coming into conflict with present federal laws" and also was not "a subject which necessarily and in all aspects requires uniformity of regulation and as to which the state cannot act at all, although Congress has not acted" (302 U. S. at 15). Then Chief Justice Hughes went on to explain further the practical application of the principle of uniformity in such a situation, saying:

> "A vessel which is actually unsafe and unseaworthy in the primary and commonly understood sense is not within the protection of that principle. The State may treat it as it may treat a diseased animal or unwholesome food. In such a matter, the State may protect its people without waiting for Federal action providing the state action does not come into conflict with Federal rules. If, however, the State goes further and attempts to impose particular standards as to structure, design, equipment and operation which in the judgment of its authorities may be desirable but pass beyond what is plainly essential to safety and seaworthiness, the State will encounter the principle that such requirements, if imposed at all, must be through the action of Congress, which can establish a uniform rule. Whether the State in a particular matter goes too far must be left to be determined when the precise question arises" (302 U. S. at 15).

The language of Chief Justice Hughes is equally apt in explaining the principle of uniformity as applied to the matter of splash guards for interstate motor carriers.

When a state undertakes, as Illinois has done, to prescrib the exact design and structure of such equipment, it "wi encounter the principle that such requirements, if impose at all, must be through the action of Congress, which ca establish a uniform rule". Otherwise the kind of impass which has arisen between Arkansas and Illinois may b expected to occur on an ever increasing scale, for there i no reason to suppose that all states will agree on the exac structure or design of splash guards which will most effec tively serve the purposes. The effect of such conflic among state laws will be just as devastating to the econom and efficiency of interstate motor carrier operations as wa the effect upon the economy and efficiency of interstate ra operations envisaged by Chief Justice Stone from varyin train limit laws.

Furthermore, the applicability of the general principl of uniformity to motor carrier operations, as well as ra and water transportation, in determining the validity o state regulation under the commerce clause has alread been fully accepted by this Court. In *Morgan* v. *Virginia* 328 U. S. 373 (1946), this Court held invalid as applie to a passenger motor vehicle operating in interstate com merce a state statute requiring all motor carriers operat ing within the state to separate without discrimination th white and colored passengers in their busses, so that con tiguous seats would not be occupied by persons of differen races at the same time. Speaking for the Court, Mr. Jus tice Reed again reformulated the controlling principle a follows:

> "The precise degree of a permissible restriction o state power cannot be fixed generally or indeed no even for one kind of state legislation, such as taxatio or health or safety. There is a recognized abstrac principle, however, that may be taken as a postulat for testing whether particular state legislation in th absence of action by Congress is beyond the Stat

power. This is that the state legislation is invalid if it unduly burdens that commerce in matters where uniformity is necessary—necessary in the constitutional sense of useful in accomplishing a permitted purpose. Where uniformity is essential for the functioning of commerce, a state may not interpose its local regulation. Too true it is that the principle lacks in precision. Although the quality of such a principle is abstract, its application to the facts of a situation created by the attempted enforcement of a statute brings about a specific determination as to whether or not the statute in question is a burden on commerce. Within the broad limits of the principle, the cases turn on their own facts" (328 U. S. at 377-378).

It is also significant that Mr. Justice Reed thought it appropriate to add: "Appellants' argument, properly we think, includes facts bearing on interstate motor transportation beyond those immediately involved under the Virginia statutory regulations. To appreciate the weight of the burden of the Virginia statute, related statutes of other states are important to show whether there are cumulative effects which may make local regulation impracticable." These cumulative effects to which Mr. Justice Reed referred could only have involved the embarrassment and delays attendant upon the seating and reseating of passengers in accordance with the varying degrees to which segregation on racial grounds was required, permitted or forbidden by different state statutes. If such interference with the efficiency of interstate passenger transportation by motor carriers was sufficient to invalidate state passenger segregation laws as unduly burdening interstate commerce, then surely the deleterious effects demonstrated in this record upon the safety, economy and efficiency of interstate freight transportation by motor carriers, to say nothing of the complete obstruction of certain aspects of such transportation, are more than sufficient to invalidate the Illinois Splash Guard Act under attack.

Conclusion.

Because the District Court correctly applied to the particular facts of this case the appropriate principles governing the determination of the validity of a State statute challenged as invalid under the commerce clause, its decision should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE.

I, David Axelrod, one of counsel for appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on or before the 17th day of February, 1959, I served copies of the foregoing Brief for Appellees on Appellants, as follows:

By mailing five copies of said Motion to Affirm to

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in a duly addressed envelope, postage prepaid.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1958

No. 94

JOSEPH D. BIBB, Director of the Department of Public Safety of the State of Illinois, and WILLIAM H. MORRIS, Superintendent of the Division of State Highway Police, Department of Public Safety of the State of Illinois,

Appellants,

vs.

NAVAJO FREIGHT LINES, INC., a New Mexico corporation, RINGSBY TRUCK LINES, INC., a Nebraska corporation, PRUCKA TRANSPORTATION, INC., a Nebraska corporation, DENVER CHICAGO TRUCKING CO., INC., a Nebraska corporation, WATSON BROS. TRANSPORTATION CO., INC., a Nebraska corporation, PACIFIC INTERMOUNTAIN EXPRESS CO., a Nevada corporation, ARKANSAS-BEST FREIGHT SYSTEM, INC., an Arkansas corporation, and SCHERER FREIGHT LINES, INC., an Illinois corporation,

Appellees.

(APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS, SOUTHERN DIVISION.)

REPLY BRIEF FOR APPELLANTS.

Certificate of Service Appended at Page 7.

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INDEX.

PAGE

I—Appellees do not overcome the effect of the undisputed facts stated and the authorities cited in Appellants' original brief. For the reasons set forth in that brief the judgment appealed from should be reversed 1

Conclusion 6

Certificate of Service 7

Cases and Statutes Cited.

California v. Thompson, 313 U. S. 109, at pp. 113-114 .. 3

Dean Milk Co. v. Madison, 340 U. S. 349 5

Kelly v. Washington, 302 U. S. 1 5

Minnesota v. Barber, 136 U. S. 313 5

Morgan v. Virginia, 328 U. S. 373 5

People v. Warren, 11 Ill. 2d 420 4

Rudolph Express Co. v. Bibb, 15 Ill. 2d 67 4

Southern Pac. Co. v. Arizona, 325 U. S. 761 2

Terminal Railroad Assn. v. Brotherhood of Railroad Trainmen, 318 U. S. 1 2

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Appellees.

(APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS, SOUTHERN DIVISION.)

REPLY BRIEF FOR APPELLANTS.

I.

Appellees do not overcome the effect of the undisputed facts stated and the authorities cited in Appellants' original brief. For the reasons set forth in that brief the judgment appealed from should be reversed.

Appellees have cited no decision of this Court invalidating a State statute or other regulation governing the equipment of trucks or motor vehicles that, although moving

in interstate commerce, travel upon a system of highways built and maintained by the State.

Appellees place chief reliance upon this Court's decision in *Southern Pac. Co.* v. *Arizona,* 325 U. S. 761, in which this Court held invalid a State law limiting the number of cars upon trains traversing that State. That case did not involve State highways. Moreover in that case the Interstate Commerce Commission had entered an order, not controlling the case because it was entered after the facts there involved had arisen but nevertheless very persuasive in its teaching, suspending the action of State statutes limiting the length of cars for the duration of the war. There was also a showing that decreasing the length of trains meant increasing the number thereof, with a consequent increase in the risk of accidents.

If cases involving the regulation of railroad trains are to be consulted, far more closely analogous to the instant case than the *Southern Pac. Co.* case is *Terminal Railroad Assn.* v. *Brotherhood of Railroad Trainmen,* 318 U. S. 1.

In the *Terminal Railroad* case this Court sustained an order of the Illinois Commerce Commission requiring the Terminal Railroad to couple cabooses onto trains traversing railroad bridges spanning the Mississippi River between Illinois and Missouri. The Court held the regulation valid even though the Court noted "that there do not exist, and that it is not reasonably practicable to install, facilities for taking on and dropping off cabooses at the point where the trains cross the state lines; and that the practical consequence of the order is that if cabooses are to be used in Illinois on runs of the second sort" (that is, on runs from Illinois into Missouri across the Mississippi) "they must also be used at least as far as the nearest switching point in Missouri."

Continuing, the Court said at page 8:

> "As to both classes of runs, the effect of the order is in some measure to retard and increase the cost of movements in interstate commerce. This is not to say, however, that the order is necessarily invalid. In the absence of controlling federal legislation this Court has sustained a wide variety of state regulations of railroad trains moving in interstate commerce having such effect. The governing principles were recently stated in *Parker* v. *Brown*, 317 U. S. 341, 361-363."

The *Terminal Railroad* case is incisively similar to the instant case in that the coupling of cabooses on interstate trains, like the affixing of contour mudguards in the instant case, entailed a burden upon interstate commerce and in effect would require as to some trains the transportation of cabooses into Missouri, just as with respect to the interstate traffic involved in the instant case, appellees will in many instances find it necessary or more convenient to transport contour mudguards from other states in Illinois and from Illinois into other states than to affix such mudguards at State boundaries.

It is to be noted that the *Terminal Railroad* case was cited with approval in the *Southern Pacific* case (325 U. S. at page 779).

For the Court's immediate convenience, we reprint the often quoted language of Mr. Justice Stone in *California* v. *Thompson*, 313 U. S. 109, at pages 113-114:

> "A state may license trainmen engaged in interstate commerce in order to insure their skill and fitness. *Smith* v. *Alabama*, 124 U. S. 465; *Nashville, C. & St. L. Ry. Co.* v. *Alabama*, 128 U. S. 96. It may define the size of crews manning interstate trains, *Chicago, R. I. & P. Ry. Co.* v. *Arkansas*, 218 U. S. 453; *Missouri Pacific R. Co.* v. *Norwood*, 283 U. S. 249, and prescribe regulations for payment of their wages. *Erie R. Co.* v. *Williams*, 233 U. S. 685. It may require interstate pas-

senger cars to be heated and guard posts to be placed on bridges of an interstate railroad. *New York, N. H. & H. R. Co.* v. *New York*, 165 U. S. 628. It may limit the speed of interstate trains within city limits. *Erb* v. *Morasch*, 177 U. S. 584. It may require an interstate railroad to eliminate grade crossings. *Erie R. Co.* v. *Public Utility Commissioners*, 254 U. S. 394, 409, 412. It may pass local quarantine laws applicable to merchandise moving in interstate commerce, as a means of protecting local health. *Morgan's S. S. Co.* v. *Louisiana*, 118 U. S. 455; *Compagnie Francaise* v. *Board of Health*, 186 U. S. 380. It may regulate and protect the safe and convenient use of its harbors and navigable waterways unless there is conflict with some act of Congress. *Willson* v. *Black Bird Creek Marsh Co.*, *supra*; see *Clyde Mallory Lines* v. *Alabama*, 296 U. S. 261, 267. It may regulate pilots and pilotage in its harbors, *Cooley* v. *Board of Port Wardens*, *supra*. Where, as here, Congress has not entered the field, a state may pass inspection laws and regulations, applicable to articles of interstate commerce, designed to safeguard the inhabitants of the state from fraud, provided only that the regulation neither discriminates against nor substantially obstructs the commerce. *Turner* v. *Maryland*, 107 U. S. 38; *Plumley* v. *Massachusetts*, 155 U. S. 461; *Petapsco Guano Co.* v. *North Carolina*, 171 U. S. 345, 357, 358; *Savage* v. *Jones*, 225 U. S. 501; see also *Minnesota Rate* Cases, 230 U. S. 352, 398-412 and cases cited; *South Carolina Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177, 185-191 and cases cited."

In *California* v. *Thompson*, cited above, this Court sustained a State act requiring the bonding of locally operating agents for the brokerage of interstate transportation over the public highways of the State.

Appellees deprecate the pronouncements of the Supreme Court of Illinois in *People* v. *Warren*, 11 Ill. 2d 420, and *Rudolph Express Co.* v. *Bibb*, 15 Ill. 2d 67, declaring the Illinois Contour Mudguard statute to be "reasonable" because those pronouncements were made in response to an

invocation of the due process clause rather than the commerce clause of the Federal Constitution.

To be sure, there are cases and contexts in which the criterion of "reasonableness" with respect to due process are not controlling when a state law is sought to be applied to interstate commerce. And of course decisions of a State's highest court are never binding upon this Court as to the federal constitutionality of state laws. But where measures calculated to preserve safety and life upon state highways are involved, the question of "reasonableness" is much the same in applications of the commerce clause as it is in applications of the due process clause.

It is most significant that appellees do not dispute and in effect concede the correctness of the decisions of the Supreme Court of Illinois in the Warren and Rudolph Express Company cases. With this virtual concession that the Supreme Court of Illinois correctly held the instant measure valid as against the claim that it was so unreasonable as to deny due process, appellees virtually give away their case under the commerce clause. Appellants at once rely upon and distinguish this Court's decision, cited and relied on by appellants in their original brief at page 17, in *Kelly v. Washington*, 302 U. S. 1. In that case, as we have shown at length in our original brief, this Court sustained a State regulation of the hulls and machinery of tugs traveling in interstate commerce.

Morgan v. *Virginia*, 328 U. S. 373, invalidated a provision requiring the segregation of white from colored passengers when busses moved from the District of Columbia into Virginia. No question of health, safety or the preservation of life was involved.

Appellees cite *Minnesota* v. *Barber*, 136 U. S. 313, and *Dean Milk Company* v. *Madison*, 340 U. S. 349, not as in

point upon the facts but as sustaining the general proposition that laws that discriminate against interstate commerce will be held invalid and that this Court may appraise the impact of such laws upon such commerce. Appellants do not challenge these generalities of constitutional jurisprudence. The *Dean Milk* case dealt with a discrimination against interstate milk and the *Barber* case dealt with a discrimination against imported meats. The present Illinois Act applies not only to foreign vehicles entering Illinois but to Illinois vehicles.

Appellees have not overcome the demonstration in appellants' original brief that the determination that public safety in Illinois will be enhanced by contour mudguards of the type required by the instant statute was within the ambit of legislative determination and does not unconstitutionally burden interstate commerce.

Conclusion.

For the reasons urged in appellants' original brief and in this brief, it is respectfully submitted that the judgment appealed from should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE.

I, Raymond S. Sarnow, one of counsel for appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on or before the 17th day of March, 1959, I served copies of the foregoing Reply Brief for Appellants as follows:

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